TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 137

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MAY 16, 1963

CERTIORARI GRANTED OCTOBER 14, 1963

SUPREME COURT OF THE UNITED STATES

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IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 6035

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal from the United States District Court for the District of Massachusetts

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APPELLANTS' RECORD APPENDIX

Relevant Docket Entries

EUGENE H. BIRD, JOHN J. BURNS, PAUL C. CABOT, CHARLES A. COOLIDGE, LEO F. DALEY, EDWARD M. FARNSWORTH, HENRY W. HILLS, HALFDAN LEE, H. S. PAYSON ROWE, LESTER MARTIN, CHARLES B. HOUSTON, 2ND,

and

RALPH W. KURTZ, as they are Trustees of EASTERN GAS AND FUEL ASSOCIATES under an agreement and declaration of trust, etc.

v.

UNITED STATES OF AMERICA

Contract—(Merchant Ship Sales Act)

Admiralty

No. 55-26-W — Wyzanski, D. J.

1955	
May 10	Libel filed.
1959	
Oct. 19	Answer of defendant filed. Affidavit of Robert G. Klages attached thereto.
1960	
Feb. 15	Cross-libel filed by the USA against Massachusetts Trustees of Eastern Gas and Fuel Associates.
Sept. 30	Exceptive allegations to the cross-libel filed.
Oct. 4	Exceptions to cross-libel filed.
Nov. 22	Wyzanski, J. Hearing on exceptions to cross-libel. Taken under advisement.
Nov. 22	Supplemental affidavit of Robert A. Caswell filed.
Nov. 22	Affidavit of William M. Brady filed.

1981

Jan. 29 — Exhibits submitted in support of supplemental recommendations of cross-respondents filed.

1982

Jan. 2 — Affidavit of Lawrence F. Letellier filed.

Jan. 5 — Wyzanski, J. Hearing on exceptions to cross-libel. Matter under advisement.

Jan. 15 — Wyzanski, J. Opinion entered. Copies mailed to James B. Richman, Esq., 1000 Stuart St., Boston; J. Franklin Ford, Esq., Kaminen and Ford, 1000 K St., N. W., Washington, D. C.; and Asst. U. S. Atty. Richford, 1107 Federal Bldg., Boston, Mass.

April 2 — Wyzanski, J. Hearing on validity of accounting cut-off period and on change in Court's opinion re fair value of assets. Parties to prepare stipulation re small change in opinion and to present draft of suggested findings and conclusions 30 days from date. Also prepare suggested form of decree embodying rulings which have already been made and those rulings which Court may hereafter make.

May 2 — Findings of fact and conclusions of law proposed by respondent cross-libellant U.S.A. filed.

May 2 — Wyzanski, J. Findings of fact and conclusions of law supplementary to the opinion of January 15, 1982 entered. *The second cause of action of libel is dismissed on the merits.*"

May 2 — Wyzanski, J. It is ordered

1. The opinions of this Court filed on Jan. 15, 1982 and on May 2, 1982 are adopted as the Court's findings of fact and conclusions of law;

2. That there is no just reason for delay in entering final judgment upon the Fifth and Sixth separate causes of action set forth in the libel and on the cross-libel

3. The Fifth separate cause of action set forth in the libel is dismissed on the merits

4. The Sixth separate cause of action set forth in the libel is dismissed on the merits.

5. The Fifth separate cause of action set forth in the cross-libel is dismissed on the merits.

Form 33 Notice of appeal filed by Mass. Trustees of Eastern Gas and Fuel Associations. Service accepted by Asst. U.S. Attny.

Volume I. Document 10

[Caption Omitted]

Opinion

January 15, 1962

Weinfeld, D. J.

A. Introduction

This controversy involves the validity and interpretation of Part I Clause E and Part II Clauses 2 [12] and 13 of the standard bareboat [sic] charter contract of the Maritime Commission under § 709(a) of The Merchant Marine Act, 1936, 49 Stat. 1985 and § 5(b) and (c) of The Merchant Ship Sales Act, 1946, 60 Stat. 41. Essentially the dispute turns on whether the Commission acted *intra vires* in providing in the charter for the recapture of a charterer's profits by the Government on the basis of a contractual additional excess profits rate, not covered by § 709(a) of The Merchant Marine Act of 1936.

B. Pleadings in This Suit

Trustees of Eastern Gas and Fuel Associates (hereafter called "Eastern") filed, under the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. § 741, a libel against the United States. The prayer sought recovery of approximately $220,000 alleged due because of Eastern's excess payments of charter hire for 10 United States Government vessels.

The first cause of action pleaded in the libel makes allegations substantially as follows. The Merchant Ship Sales Act of 1946, 60 Stat. 41 authorized the Government to charter, on a bareboat basis, certain war-built vessels. The Maritime Commission, on April 13, 1946, entered, and, on April 23, 1946, published General Order 60, reciting the terms on which it would charter such vessels. Conforming to the Order, the Commission prepared bareboat charter contract MCe-41881. November 7, 1946, libelants, and,

November 13, 1948 [1946], the Government executed that contract. Upon the basis of the libelants' preliminary accounting statements, based upon the Government's computation of charter hire, the libelants made payments on account. By Audit Report, dated August 20, 1954 the Government made its final review of libelants' accounting. This process required libelants to make payments which libelants allege were excessive and unlawful because contrary to § 709 of the Merchant Marine Act, 1936, 49 Stat. 1985 incorporated in § 5(c) of the Merchant Ship Sales Act of 1946, 60 Stat. 41. Libelants vainly demanded from the Government reimbursement of these allegedly excessive and unlawful payments amounting to approximately $78,000.

The second cause of action repeats the allegations as to the Commission's authority to contract, as to the execution of the contract, and as to the preliminary accountings. Then the libelants allege that on August 15, 1947 the Commission served on libelants a notice effective September 1, 1947, purporting to terminate the charters unless the libelants agreed to an amendment providing that additional charter hire for voyages commenced after September 1, 1947 be computed separately from voyages commenced prior thereto. The libelants allege that this additional charter hire was contrary to the law and the original contract. But "the libelants, under duress and threat of the illegal termination of the charter and without consideration, executed the addendum . . ." The libelants, pursuant to this allegedly improper addendum, paid the Government $148,554.90, for which they have vainly demanded reimbursement.

The third cause of action repeats much of what is allegal in the second cause of action. But the libelants further, and as an alternative to the second cause of action, plead that even if the aforesaid addendum were valid, and even if the libelants do not succeed on their second cause of action, nonetheless the Government has

wrongfully included in the accounting under the addendum the expenses incurred after September 1, 1947 in connection with the S.S. EMILY DICKINSON and the S.S. JAMES BOWDOIN, both of which are asserted not to have engaged in voyages on or after September 1, 1947. The libelants paid on this account $58,563.91, for which they have vainly demanded reimbursement.

In its answer the Government admits that the Commission made the bareboat charter contract set forth in the libel, and that the Government has refused to pay back the charter hire paid by the libelants. But the Government pleads that not merely the bareboat charter contract of November 1946, but also the addendum, sometimes called "Shipsales Demise Contract No. MCc-41881, Addendum No. 7, executed in October 1947, were valid under relevant statutes. Furthermore, the Government sets forth as separate defenses that the libelants, knowing the terms of the statute and proposed charters, first, voluntarily executed the contracts and made the payments thereunder, second, did not promptly seek equitable or other relief, and third, did not seek relief within the period of the statute of limitations.

Later, the Government filed a cross-libel.

In its first cause of action, it claimed that for the vessels chartered under the bareboat charter contract No. MCc-41881 Eastern owes $1,125,808.06, which is the difference between the total charter hire actually paid by Eastern, and "the world market hire rate of $2,298,607. (said to be) required to be paid . . . pursuant to section 5 of the Merchant Ship Sales Act of 1946."

In its second cause of action, the Government claimed that under the aforesaid contract Eastern agreed, particularly in Clause 13, Part II, to a schedule which calls for payments of $528,306.68, of which only $464,876.09 has been paid, leaving still due $63,430.59.

In its third cause of action, the Government claimed that despite § 709(a) of the Merchant Marine Act of 1936, which is incorporated under the aforesaid contract, Eastern in accounting erroneously carried forward from the 1946 annual accounting period into the 1947 annual accounting period "losses plus 10% per annum on the charterer's capital necessarily employed in the business of the vessels in the sum of $5,033.47 . . .' thereby decreasing the cumulative net voyage profits in the 1947 accounting period and consequently decreased the amount of charter hire due . . . by ninety per cent of $5,033.47, or [so it is pleaded] $4,530.10."

In its fourth cause of action, the Government for the first time in this litigation referred to Addendum No. 5 to Contract No. MCc-41881, executed by Eastern May 28, 1947 and by the Government July 17, 1947. The Government claimed that under that addendum, for accounting purposes, all vessels under the charter were to be considered as a separate fleet and accounting was to be done on an annual basis. Despite this, Eastern carried forward from the 1946 annual accounting period to the 1947 annual accounting period losses plus 10% per annum on the charter's [sic] capital, "thereby decreasing the cumulative net voyage profits in the 1947 accounting period and consequently decreased the amount of charter hire due . . . in the 1947 annual accounting period by fifty per cent of $6,186.78 or [so it is pleaded] $3,063.09."

Eastern replied with "Exceptions to Cross-Libel." This alleged first, that the cross-libel failed to state a claim upon which relief may be granted; and second, that the first, [not the second], third, and fourth causes of action fail to state a claim within the jurisdiction of this Court."

Then Eastern filed "Exceptive Allegations to the Cross-Libel." This alleged that the Government's first cause of cross-libel had no merit in view of the provisions of the charter contract No. MCc-41881, and that the third and

fourth causes had no merit in view of § 709(a) of the Merchant Marine Act of 1936, 49 Stat. 1985, 46 U.S.C. § 1199(a) and the Maritime Commission's regulations appearing in 46 CFR 209.49.

C. Findings Based on Hearing of January 3, 1962

1. Following the pleadings recited above, the parties filed elaborate briefs and affidavits, running to hundreds of pages. On January 3, 1962 this Court held a hearing at which from these affidavits and like documents the parties selected more than a score of exhibits which they agreed should be received, and which this Court did receive, as evidence. The parties pressed for rulings on the exceptions, the exceptive allegations, and all other matters ripe for rulings of law. From the discussion at the bar it appeared that if this Court ruled now upon the interpretation and validity of the contract on which both the libel and the cross-libel are based, certainly further trial, if any were needed, in this Court would be expedited, and possibly immediate appeal to the Court of Appeals on certain aspects of the case might be proper. On this basis, this Court will address itself to both the facts and the law relevant to the pivotal contract.

2. As of October 1, 1946 Eastern and the Commission entered into a bareboat charter, Contract No. MCc-41881, for the use of certain Government-owned vessels.

3. This contract was in the Commission's then standard form, heretofore considered in *Sword Line* v. *U. S.*, 2nd Cir., 228 F. (2d) 344, (per L. Hand, C.J.); *Dichman, Wright, & Pugh, Inc.* v. *U. S.*, S.D.N.Y., 144 F. Supp. 922, (per Dimock, D.J.); *U. S.* v. *East Harbor Trading Corp.*, S.D.N.Y., 190 F. Supp. 245, (per I. Kaufman, D.J.); *American Export Lines Inc.*, v. *U. S.*, Ct. of Cl., 290 F. (2d) 925, (per Whitaker, J., Madden, J. dissenting); *U. S.* v. *Moore-McCormack Lines, Inc.*, D. Md., unreported, 1961, (per Thomsen D.J.); and other cases not now necessary to cite.

4. In this standard form contract the portions now relevant are Part I Clause E and Part II Clauses 2 [12] and 13, which read as follows:

"Part I

CLAUSE E. *Rate of Basic Charter Hire.* Unless otherwise specially agreed such rates as appear opposite the name of each Vessel listed in Clause C(1) and such addenda as appear opposite the name of each Vessel listed in Clause C(1) and such addenda as may be executed. [sic]

Part II

Clause 12. *Basic Charter Hire.* The Charterer shall pay to the Owner the basic charter hire at the monthly rate provided for in Part I hereof from the day and hour of delivery of the Vessels until and including the day and hour of redelivery to the Owner pursuant to the terms of this Agreement; or if any Vessel shall be lost, hire shall continue until the time of her loss, if known, or if the time of loss be uncertain then up to and including the time last heard from. Payment of such basic charter hire shall be made to the Owner at Washington, D. C., on delivery of the Vessel for the remainder of the calendar month in which delivery is made, and thereafter monthly in advance on the first day of each month.

Clause 13. *Additional Charter Hire.* If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the

Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed)not in excess of $100 per day—50%.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such over-

payments refunded to the Charterer as may be required."

5. October 29, 1946, the Commission issued Supplement 8 to General Order 60, 11 F.R. 13215, 46 C.F.R. 299.31(k), 299.49, and 299.56(b)(5), the pertinent parts of which read as follows:

"(k) *Preliminary determination and payment of "additional charter hire".* On or before November 30, 1946 and on or before the end of each succeeding calendar month, every charterer under a bareboat charter agreement SHIPSALESDEMISE 303 shall pay over to the Commission ninety percent (90%) of the amount then indicated to be due the Commission on account of additional charter hire under that agreement and under WARSHIPDEMISEOUT 203 (if the chartered vessels from the War Shipping Administration under that form of agreement) for the period ending two calendar months prior to that date, after deducting, with respect to such payments made subsequent to November 30, 1946, the amount of any previous payments made on account of additional charter hire for the period and under the agreement involved. Such payments shall be deemed to be preliminary and subject to adjustment upon the completion of audit by the Commission covering the period involved, and neither the tender thereof by the charterer, nor its acceptance by the Commission, shall prejudice the rights of either under the applicable bareboat charter agreement or otherwise. The amounts of such payments shall be calculated in accordance with the applicable provisions of the respective agreements, particularly Clause (H)—"Special Provisions" of Part I and Clauses 13—"Additional Charter Hire" and 23—"Definitions" of Part II of SHIPSALESDEMISE 303, and Clauses 13—"Additional Charter Hire" and 23—"Definitions" of Part II of WARSHIPDEMISEOUT 203, and in accordance

with these regulations. In instances where audited financial and operating statements have not been prepared by the charterer from its records or by its public accountants, tentative calculations should be prepared for this purpose."

"46 CFR 299.49:

Calculation of net voyage profit on cumulative basis

In providing for the calculation of additional charter hire based on the cumulative net voyage profit of the Charterer, Clause 13 of Part II of SHIPSALESDEMISE 303 provides also that such cumulative net profit so accounted for shall not be included in the calculation of cumulative net profit in any subsequent year or period. Pursuant to these provisions of the bareboat charter agreements, only deficiencies in net voyage profits may be carried forward, . . ."

"46 CFR 299.56(b)(5):

(5) That if, in any instance, the rules and regulations prescribed herein should conflict with the provisions of an applicable statute or agreement, such provisions shall govern."

6. Eastern has continuously since August 15, 1946, when it joined with other members of the American Merchant Marine Institute, Inc. in a telegram to the Commission, protested that the rates of so-called "additional charter hire" specified in Part II Clause 13 of the standard contract exceed the rate authorized by applicable law. Although Eastern executed Contract No. MCc-41881, including Part II Clause 13, and made payments pursuant thereto, it has always relied on the Commission's assurance in Supplement 8 to General Order No. 6, particularly 46 C.F.R. 293.31(k)(1) [299.31(k)(1)], that "neither the tender" of payments "by the charterer, nor its acceptance by the Commission, shall prejudice the rights of either under the applicable bareboat charter agreement or otherwise."

7. To date, Eastern has paid the Commission $1,125,808.06 on account of Contract No. MCc-41881. At this time it is unnecessary to state the details, or to say more than that the payments have in general, and subject to some variations, been in accord with the broad outlines of the letter of the contract.

D. The Statutory Background

1. In this litigation we are concerned with two statutes which are *in pari materia*,—The Merchant Marine Act, 1936, 46 [49] Stat. 1985 and The Merchant Ship Sales Act of 1946, 69 Stat. 41.

2. The three provisions of the 1936 Act which are most relevant are § 207, 49 Stat. 1985, 1988, conferring upon the Commission general powers to make contracts necessary to carry on the activities authorized by The Merchant Marine Act; § 704, 49 Stat. 1985, 2008, relating to the Commission's power to charter vessels acquired by the Commission; and § 709(a), 49 Stat. 1985, 2010, providing for recapture of excess profits. The texts, so far as relevant, read as follows:

> "Sec. 207. The Commission may enter into such contracts, upon behalf of the United States, as may, in its discretion, be necessary to carry on the activities authorized by this Act, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter."

> "Sec. 704. All vessels transferred to or otherwise acquired by the Commission in any manner may be chartered or sold by the Commission pursuant to the further provisions of this Act."

> "Sec. 709. (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumu-

lative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

(b) Every charter shall contain a definition of the terms 'net voyage profit' and 'fair and reasonable overhead expenses', and 'capital necessarily employed', as said terms are used in subsection (a) of this section, setting forth the formula for determining such profit and overhead expense and capital necessarily employed, which definitions shall have been previously approved by the Commission and published in the advertisement for bids for such charter."

3. The section of the 1946 Act which is most relevant is § 5, 60 Stat. 41, 43, governing the "Charter of War-Built Vessels To Citizens", and providing for citizens' applications for charters, for the Commission's fixing of charter hire, and for the mandatory application to charters of, *inter alia*, § 709(a) of the 1936 Act. The whole text of § 5 follows:

"Sec. 5. (a) Any citizen of the United States and, until July 4, 1946, any citizen of the Commonwealth of the Philippines, may make application to the Commission to charter a war-built dry-cargo vessel, under the jurisdiction and control of the Commission, for bareboat use. The Commission may, in its discretion,

either reject or approve the application, but shall not so approve unless in its opinion the chartering of such vessel to the applicant would be consistent with the policies of this Act. No vessel shall be chartered under this section until sixty days after publication of the applicable prewar domestic cost in the Federal Register under subsection 3(c) of this Act.

(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rates for similar vessels for similar use as determined by the Commission.

(c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section."

E. Interpretation of the Relevant Statutes

1. By § 5 of the 1946 Act, and, to some extent, by § 207 and § 704 of the 1936 Act, the Commission was given power to charter Government-owned vessels of the type here in issue.

2. The first sentence of § 5(b) lays down two requirements: (1) that the Commission fix charter hire "at such rate as the Commission determines to be consistent with

the policies of this Act." and (2) that "such rate shall not be less than 15 per centum of the statutory sales price (computed as of the date of the charter)." . . . "except upon the affirmative vote of not less than four members of the Commission."

3. Before making any other comment, I underline the point that on the face of the statute the words "basic rate" do not appear. That term is a coinage of lawyers seeking brevity, ease of recollection, and vividness. But it may have circulated confusion. It carries an unfounded connotation of a fixed maximum-minimum formula. No such double-edged formula appears explicitly in the Act.

4. Neither the first of the two requirements in § 5(b) nor any other part of the statute requires that the Commission make its determination by regulation, [or] by order after notice and hearing. The situation is quite unlike the case where an administrative agency prescribes a regulation, or compels, under penal or civil sanction, adherence to a rule of conduct, or requires persons to suffer detriments, or proposes a scale of benefits. Hence there is no room for the application of such cited cases as *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196-197 and *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 676. For purposes of § 5(b) of the 1946 Act, the Commission "determines" a charter hire rate when it executes a charter contract. The execution of a particular contract implies, and adequately implies, that the Commission has determined that the rates therein stipulated are "consistent with the policies of this Act."

5. Nor does the first of the two requirements of § 5(b) imply that the Commission must use some special formula, or some single measure, for fixing charter hire. If the rate "fixed by the Commission" is "consistent with the policies of this Act", the rate can be arrived at by any formula or combination of formulae. It can be a flat dollar figure; it can be a percentage of the statutory sales

price; it can be a combination of a percentage of the statutory sales price and of a share in the charterer's profits. *Dickman, Wright & Pugh, Inc.* v. *U. S.*, S.D.N.Y., 144 F. Supp. 922, 926, first full paragraph; *U. S.* v. *East Harbor Trading Corp.*, S.D.N.Y., 130 F. Supp. 245, 249, second column; *American Export Lines, Inc.* v. *U. S.*, Ct. of Cl., 280 F. (2d) 925, 931, second column, second paragraph.

6. Some of the authorities just cited, and at the pages just cited, assume that if the Commission does fix the rate as a combination of a percentage of the statutory sales price and of a share in the charterer's profits, the Commission must expressly refer to its purported exercise of power under § 5(b), and perhaps that the Commission must draft the contract so as either to incorporate a reference to § 5(b) or as to make the structure and wording of the contract obviously consistent with an implied reliance on § 5(b). At least this is how I construe the passages in the opinions just cited. But if my understanding of the opinions of Judges Dimock, Kaufman, and Whitaker be correct, I disagree with them. When a corporation has a statutory power to make a contract of a particular type, and it does make such a contract, it is not mandatory that the corporation recite in the contract the statutory power. Recital is common and convenient, but non-essential. And if it be argued that not only the failure to refer to the authorizing section, but also the structure and wording of the contract (particularly, the use of the non-statutory phrase "basic charter hire") show that mistakenly the corporation and the other party both supposed that the corporation was acting under a purported and non-existent authority conferred by an inapplicable section, this argument is without weight. A mistake of that kind is not such a mistake of law as to affect the validity of the contract or the assent objectively given by the parties to the contract. It is not a mistake as to the vital question of the corporation's au-

thority, but only as to the literary question as to the source of that authority. Nor is there the slightest ground for assuming that if the Commission had been apprized of the correct source of its authority, the Commission or the other party would have made a contract different in substance, as distinguished from wording.

7. (a) A more subtle argument, akin to the argument just rejected, is that if § 5(b) be the source of the Commission's authority to combine with a percentage of the statutory sales price a share of the charterer's profits, then the only permissible method of calculating the total obligations of the charterer under the contract is this: the charterers, first, would have to pay the Government (1) the stipulated percentage of the statutory sales price and (2) so much of the share of the charterer's profits as exceed the 50% of the excess profits stipulated by § 709(a) of the 1936 Act, and, second, would have to pay the Government 50% of the remaining profits. *Dichman, Wright & Pugh, Inc.* v. *U. S.*, S.D.N.Y., 144 F. Supp. 922, 926, first full paragraph. Judges Dimock and Kaufman seem to have left the parties in the cases before them to prove if they could that they had contracted to follow that method, which these judges, as I understand them, thought permissible under the statute. But the parties apparently did not follow through on that method. They seem to have recognized that it was a method not articulated in the contract, not used by either the charterer or the Government in accounting, and not otherwise contemplated by either party.

(b) Moreover, the so-called subtle argument is not tenable. Its attempted dovetailing of the 1936 and 1946 Acts rests on inexact and illusory supports. The argument, in effect, is that the phrase "the charter hire reserved", used in the parenthetical clause of § 709(a) of the 1936 statute, bears a close verbal correspondence to the phrase "the chater hire . . . fixed by the Commission", used in § 5(b) of the 1946 statute. Hence, so it is argued, "the

charter hire reserved", as used in § 709(a) of the 1936 statute, embraces both (1) the stipulated percentage of the statutory sales price and (2) so much of the share of the charterer's profits as exceed the 50% of the excess profits stipulated by § 709(a) of the 1936 Act, if both (a) and (b) were, pursuant to § 5(b) of the 1946 statute, "fixed by the Commission" as part of "the charter hire."

(c) To this verbal argument one answer is that the phrase "the charter hire reserved" in the 1936 Act was adopted a decade before the 1946 Act used the phrase "the charter hire . . . fixed by the Commission." The 1936 phrase does not refer forward to 1946. Prolepsis is not usually part of the fair canons of statutory construction. Furthermore, the 1936 phrase does not speak to the precise problem of the meaning of a term in § 5(b) of the 1946 Act, or purport to define it, or purport to use the 1946 terminology in widening the 1936 phrase.

(d) Moreover, the mere fact that § 709(a) of the 1936 Act was, a decade later, re-enacted by § 5(c) of the 1946 statute does not change what has just been said. The re-enactment was a typical patch-work job. The draftsman wanted to make applicable to charters under the 1946 law the 50% excess profits provision of the 1936 law. Probably he did not give special attention to the phrase "the charter hire reserved", used in the 1936 statute, or stop to consider what it meant. There is not the slightest indication that it was anyone's intent to give the phrase in 1946 a broader meaning than it had in 1936. Nor is there basis for stretching the term "reserved" to include a charter hire which is merely "fixed" subject to a contingency, not set aside with the unconditional absoluteness commonly connoted by the emphatic word "reserved".

(e) A second answer to the argument is that there is no policy consideration which makes it appropriate to construe the phrase the "charter hire reserved" in § 709(a) of the 1936 statute as embracing *all* that may be exacted as

"the charter hire" pursuant to § 5(b) of the 1946 statute. What § 709(a) seeks to reach is excess profits above only such part of the "charter hire reserved" as is *unconditionally* charged in the charter, (as, for example, a flat dollar rate, or a percentage of the statutory sales price of a vessel, or the prevailing world market rate for similar vessels). It does not seek to embrace any share of profits or additional payment which the Commission *conditionally* exacts from the charterer on account of any possible additional excess profit rate beyond the excess profits rate covered by § 709(a) of the 1936 Act.

(f) The Congressional excess profits capture provision in § 709(a) was, as appears on its face, designed to reach 50% of the normal profits earned by the charterer before it had deducted from such profits any sums due to the Government on account of excess profits due under an additional excess profits rate exacted by the Commission exercising its contractual powers under § 5(b) of the 1946 Act. It would not serve the Congressional design in § 709 (a) of the 1936 Act, to give to the Commission a smaller percentage of additional excess profits than either the Commission, or the charterer, or an average, intelligent reader would expect from reading Contract No. MCe-41881. More important, it would produce an anomalous, unforeseen, and almost distorted application of the broad power conferred upon the Commission by § 5(b) of the 1946 Act. Suppositious figures will serve to illustrate, and, it seems to me, prove, the point. Let use suppose the cumulative voyage profits were $300 per day. Under the method proposed by what I have called the subtle argument what would happen is that the Commission would first take $50 (representing 25% of the second and third hundred dollars) and then would take $125 (representing 50% of the remaining $250), or a total of $175. But under the method which seems to me more consonant with what Congress authorized, and what the parties contemplated, the Commission would take $50 for the first hundred dollars, and $150, or $75 each,

for the second and third hundred dollars, or a total of $200.

8. In the foregoing reasoning there has been a necessary anticipation of the correct reading of § 709(a) of the 1936 Act. As I have construed § 709(a), I, in agreement with all the judges who have previously construed it, have accepted their view that its provisions are mandatory and require the Commission so to contract as to give the Government as a *minimum* 50% of the excess profits according to the prescribed formula. *Dichman, Wright & Pugh, Inc.* v. *U. S.*, S.D.N.Y., 144 F. Supp. 922, 925; *U. S.* v. *East Harbor Trading Corp.*, S.D.N.Y., 190 F. Supp. 245, 249; and *American Export Lines, Inc.* v. *U. S.*, Ct. of Cl., 290 F. (2d) 925, 930. It is a statutory section to diminish, not to increase, charterers' windfalls. It is for the benefit of the Government, and to the possible detriment of private parties. I also accept the views of my predecessors that § 709(a) does not *ex proprio vigore* give to the Commission any authority whatsoever to set a different rate than the 50% rate. In that sense, and only in that sense, it is a *maximum* provision. If some of my predecessors implied, which I do not believe that they did imply, that the letter of § 709(a) of the 1936 Act, or the overtones of that section, somehow inhibited the Commission from using § 5(b) of the 1946 Act to exact at additional excess profits rates shares of profits not denominated in § 709(a) of the 1936 Act, I would not accept that implication. Nor would I accept the view that by implication, indirection, or otherwise § 709(a) can be utilized by a charterer to pay less than it agreed by contract.

9. I have not yet dealt with another aspect of § 5(b) of the 1946 statute. The Government has argued that the contract at bar is defective because it does not follow a command in § 5(b) that it fix a charter rate not "less than the world market charter rate for similar vessels." That argument is unsound. The world market rate is mandatory

only where "the affirmative vote of not less than four members of the Commission" is to charge "less than 15 per centum per annum of the statutory sales price." *Dichman, Wright & Pugh, Inc.* v. *U. S.*, S.D.N.Y., 144 F. Supp. 922, 925; *U. S.* v. *East Harbor Trading Corp*, S.D.N.Y., 190 F. Supp. 245, 248; *American Export Lines Inc.* v. *U. S.*, 290 F. (2d) 925, 929-930.

10. The foregoing conclusions may be summarized to the effect that the contract at bar was valid under all relevant statutes, and represented the objective assent of the parties to the terms as there stated and here interpreted.

11. If some appellate court concludes that the statement in the immediately preceding conclusion is erroneous, it is far from clear to me that Eastern would gain any advantage. If some provisions in Part II § 13 of the charter are repugnant to the 1936 or 1946 statute, I conclude that, despite the contrary *obiter dictum* of Judge Learned Hand in *Sword Line* v. *U. S.*, 2nd Cir., 228 F. (2d) 344, 346, column 1, "no contract was ever made, because the section [§ 709(a) of the 1936 Act] made the libellant's [sic] promise unenforceable, and there were therefore no mutual promises." My conclusion is based on the premise that if a statutory restriction prohibited the Commission from bargaining to recoup a larger share of excess profits than the 50% covered by § 709(a) of the 1936 Act, the Commission, so far as appears, well might have chosen to charter the vessels only if the charterer paid, say, more than 15 per centum of the statutory sales price (see Madden, J., dissenting, in *American Export Lines, Inc.* v. *U. S.*, Ct. of Cl., 290 F. (2d) 925, 932) or, say, the prevailing world market rates.

12. If a contract were never made, then the Government is now entitled to recover on a *quantum valebat basis*. If, as may be the situation, the fair rental value of the vessels chartered equals the 1946-1947 prevailing world market rate, the Government's quasi-contractual claim *prima facie*

would be for double the charter rate, that is (according to the cross-libel) $2,298,607.00 instead of $1,125,808.08. However, no doubt, a court, mindful of principles loosely called equitable estoppel, would not readily permit the Commission to achieve by a quasi-contractual claim a larger sum than it could have received on a contractual claim if the Commission's powers had not been challenged under § 709(a).

13. This Court has not now before it testimony necessary for disposing of libelant's third cause of action, and cross-libelant's second, third, and fourth causes of action. This Court will hold a hearing to receive such testimony on Monday, March 26, 1962 at 10 A.M., unless before that date the parties stipulate for some other disposition of the aforesaid causes of action.

14. Finally, this Court notes, by way of summation, that, despite the involved pattern of statutory and contractual provisions, the dominant thread in this controversy is plain. The Government had vessels which had a fair charter hire of over 2 million dollars. It did not compel anyone to charter those vessels. Congress authorized the Commission to offer those vessels for charter. The Commission, if it followed either the method that Judge Dimock and other federal judges have believed authorized, or the alternative method that I have believed permissible, was free to fix rates which would have yielded the full 2 million dollars or more. Libelant's claim is that the Commission followed an unauthorized method. I do not agree. But if I were wrong, the error of the Commission was not that it failed to follow a Congressional mandate intended to benefit libelant or others in its class. The error was that it failed to follow a Congressional mandate requiring the Commission to collect some excess profits specifically under one section and other excess profits (if agreed upon) under another section, and to point clearly which section gave authority for each part of the charter. If the methods used

by the Commission were *ultra vires*, and the rates were unauthorized, then there was no contract. And the libelant is in the anomalous position of being bound to pay the full fair value of the rental of the ships unless, as I believe, the Commission is estopped from demanding more than it was willing to take under a contract, now asserted to be vulnerable due to the most recondite technicality.

F. Adjudications

This Court now makes the following adjudications which at an appropriate time can be incorporated in a final judgment based upon the whole case, but which, unless counsel otherwise request, will not be now set forth in a formal, appealable, partial judgment.

1. Eastern's first cause of action in its libel is dismissed on the merits.

2. Eastern's second cause of action in its libel is dismissed on the merits.

3. Eastern's third cause of action in its libel is to stand awaiting the presentation of testimony at a plenary trial.

4. The Government's first cause of action in its cross-libel is dismissed on the merits.

5. The Government's second, third, and fourth causes of action in its cross-libel are to stand awaiting the presentation of testimony at a plenary trial.

6. Except insofar as they ask dismissal of the Government's first cause of action in its cross-libel, Eastern's "Exceptions to Cross-Libel" and its "Exceptive Allegations to the Cross-Libel" are denied, without prejudice to renewal at the plenary trial.

/s/ C. E. Wyzanski, Jr. D.J.
United States District Judge

Volume I. Document 15

[Caption Omitted]

Findings of Fact and Conclusions of Law Supplementary to the Opinion of January 15, 1962

May 2, 1962

WYZANSKI, D. J.

1. On January 15, 1962 this Court issued an opinion that the final judgment when entered herein should include the dismissal of libelant's first and second causes of action and the dismissal of respondent's first cause of action. This opinion is now amended in the following respects:

(a) In Section E, finding 14, pages 16 and 17, the second sentence of the finding is amended to read, "The Government had vessels which it alleges had a fair charter hire of over 2 million dollars."

(b) Section F, Adjudications, paragraph 2, page 17 is deleted. At the time the opinion was written Eastern had not had adequate opportunity to present evidence with respect to its second cause of action.

2. March 23, 1962 the parties by stipulation settled libelant's third cause of action and respondent's third and fourth causes of action. March 26, 1962 the Court entered a decree based on that stipulation.

3. There now remains for consideration only libelant's second cause of action. This cause of action, already summarized in the main opinion, has two aspects. The broader contention is that with respect to the year 1947 the Commission should have charged for all vessels chartered by Eastern during that year a rate calculated upon the accumulative net voyages profits for the year of all such vessels. The narrower contention is that the Commission had no right to require two separate accountings of the voyage profits of, respectively, the S. S. ISAAC SHARPLESS and the S. S. WASHINGTON IRVING. Each claim turns on the ques-

tion whether the Government had an unfettered right to terminate the bareboat charters.

4. As the opinion of January 15, 1962 notes, on October 1, 1946 Eastern and the Commission entered into bareboat charters, Contract No. MCe-41881, for the use of certain Government owned vessels. Many of the terms of that Contract are set out in the opinion and need not be repeated. But it is now appropriate to quote Part II, Clauses 14 and 27, of the Contract:

> "CLAUSE 14. *Termination.* Either the Owner or the Charterer may terminate the period of use of any of the vessels by giving written notice to the other party at least fifteen (15) days prior to the termination of any voyage hereunder, in which event the vessel shall be redelivered at the port of redelivery provided for in Clause G of Part I hereof upon termination of the voyage during which such notice is given."
>
> "CLAUSE 27. *Cancellation or Modification by Mutual Consent: Waivers.* This agreement may be terminated, modified, or amended at any time by mutual consent."

5. While Eastern was using the chartered vessels, the Commission on August 15, 1947 sent to Eastern and other charterers, a telegram stating:

> "The use of any and all vessels chartered to your company pursuant to the provisions of Shipsalesdemise 303 is hereby terminated as follows:
>
> With respect to vessels whose voyages terminate on or after August 31, 1947 this telegram shall be deemed to be the owner's fifteen days notice of cancellation pursuant to Clause 14 of Part II of the Charter.
>
> With respect to vessels whose voyages have terminated or will terminate prior to August 31, 1947 this

telegram will also be deemed to be the owner's fifteen days notice of cancellation pursuant to said Clause 14 and/or Clause C(2) of Part I. You will be given opportunity to continue the use of vessels under charter pursuant to new terms and conditions to be announced within the next few days.

If within seven days from date hereof you advise as to those vessels which are engaged solely in domestic trade, the Commission will except such vessels from this notice."

6. The Commission on August 20, 1947 sent to Eastern and other charterers a telegram stating:

"Pursuant to the Commission notice of August 15, 1947, as to the termination of the use of all vessels chartered to your company subject to the provisions of Shipsalesdemise 303, the U. S. Maritime Commission today authorized an addendum to its bareboat charter agreement for warbuilt vessels, "Shipsalesdemise 303", effective as of September 1, 1947, providing substantially as follows:

1. Rates of basic and additional charter hire for foreign trade remain unchanged stop

2. Period of about six months, but no voyages to be commenced after February 29, 1948, subject to termination as to any vessels on fifteen days' notice by either party to be given after a period of sixty days from the date when the vessel becomes subject to the provisions of the addendum stop

8. The payment of additional charter hire pursuant to Clause 13 shall be computed separately for those voyages commenced prior to September 1, 1947, and those which commence under the addendum to the charter agreement herein authorized, with the understanding that the Maritime Commission may permit charterers to establish reserves for repair

expenses and expenses usually covered by P & I insurance stop

Please advise not later than August 27, 1947, if you accept the addendum as specified herein. Upon written notice being given of such acceptance, you are authorized to continue the use of any vessels now chartered to you pursuant to Shipsalesdemise 303 under the present terms and conditions as to any approved voyages commencing prior to September 1, 1947, but the voyages of any new vessel allocations after August 20, 1947, shall be under the terms and conditions of the addendum. If such written notice of acceptance of the addendum is not received by the Commission on or before August 27, 1947 all vessels, pursuant to the provisions of Shipsalesdemise 303, shall be redelivered in accordance with the terms of such charter upon completion of approved voyages commenced prior to September 1, 1947."

7. August 25, 1947, Eastern sent a telegram to the Commission stating:

"Retel yours of August 15 and August 20 we accept addendum specified your wire of August 20 and have all vessels now chartered to us pursuant to Ship Sales Demise Charter Form 303 committed load coal during September with one exception which vessel loads early October."

8. In October, 1947, the Commission and Eastern executed Addendum No. 7 to the charter which embodied the terms of the foregoing telegrams. The relevant terms of that Addendum follow:

"WHEREAS, on August 15, 1947, the Owner served notice of termination pursuant to Clause 14, Part II, with respect to vessels hereunder operating in foreign trades, and simultaneously advised that the Charterer would be given an opportunity to continue the use of

such vessels under charter in accordance with new terms and conditions to be announced, and

WHEREAS, such new terms and conditions were promulgated by the Owner on August 20, 1947; and were accepted by the Charterer, with respect to the vessels hereinafter named, and

WHEREAS, the parties hereto desire to amend this Agreement accordingly.

NOW, THEREFORE, in consideration of the premises, this Agreement is hereby amended as follows with respect to vessels engaged in foreign trades, which are listed on the attached schedule marked "Exhibit A" and made a part hereof by reference:

• • • • •

III. *Additional Charter Hire.* Additional charter hire, pursuant to Clause 13, Part II, shall be computed, accounted for and paid separately for voyages which are subject to the terms of this addendum, which shall be treated for accounting purposes as if it constituted a separate charter between the parties."

The vessels remained under the charter, as so amended, and none was redelivered.

9. During the year 1947 the voyages of Eastern's chartered vessels which commenced prior to September 1, 1947, resulted in profits for which, under the terms of clause 13 of the charter, libelant became obligated to pay additional charter hire in the amount of approximately $516,696. The voyages which commenced after September 1, 1947 resulted in losses of approximately $118,000 (after adjustments required as a result of the stipulated settlement of libelant's third cause of action).

10. On July 10 and August 2, 1947, respectively, Eastern entered into single voyage charters with Association Technique De L'Importation Charbonniere ("ATIC"),

an agency of the French Government, for the carriage of two full cargoes of coal from Baltimore to French ports. These voyage charters named the bareboat-chartered vessels SS ISAAC SHARPLESS and SS WASHINGTON IRVING, with contemplated loading of the first vessel between August 18-28, 1947, and of the second vessel between September 1-13, 1947. These voyage charters were submitted to, and approved by, the Director of Traffic of the Maritime Commission prior to August 15, 1947, in accordance with clause 22 of the charters, and the regulations quoted below.

11. In June of 1946, and subsequently, the Commission issued regulations applicable to all bareboat charters, requiring that copies of all voyage charters which contemplated the use of the chartered vessels be submitted to the Director of Traffic for approval before such voyage charters were executed. The provisions of these regulations were summarized in a circular letter to all bareboat charterers dated February 10, 1947, reading in part as follows:

> "In order that there be no further misunderstandings we bring to your attention a few of the requirements which *must* be adhered to in order to avoid violation of your bareboat charter.
>
> (1) *All* proposed voyages must be submitted to this office for approval *prior* to the actual fixing of the vessel. This may be done by telephone or telegram, setting forth rates, terms and conditions of the proposed venture. (It is suggested that your offers for fixtures be made subject to the approval of the Maritime Commission.)
>
> (2) After a proposed voyage with its attendant rates, terms and conditions has been approved, a certified copy of all charters, booking agreements, or contracts of affreightment shall be submitted to this office. (If this has not been done, copies of all

charters, etc., should be submitted to this office immediately. (Emphasis in original.)

* * * * *

Bareboat charterers who fail to comply with the foregoing requirements and the provisions set forth in W.S.A. Bareboat Regulation No. 3 may violate the provisions of their fleet charter and incur the penalties set forth therein. Kindly be guided accordingly."

12. The voyage charters with ATIC each contained clauses reading as follows:

"29. It is understood that the owners of the vessel (United States and/or Maritime Commission) has the right under Clause #14 of the bareboat charter existing between the owners of the vessel and MYSTIC STEAMSHIP DIVISION, EASTERN GAS & FUEL ASSOCIATES, Bareboat Chartered Owner, to terminate the period of use of the vessel by giving written notice to the bareboat charterers at least 15 days prior to the termination of any voyage. Should the owner of the vessel exercise this prerogative or any other prerogatives it may have under the bareboat charter existing with MYSTIC STEAMSHIP DIVISION, EASTERN GAS & FUEL ASSOCIATES, that might frustrate the performance of this charter, then this charter to be cancelled without penalty or liability on the part of any of the parties hereto. The Bareboat Chartered Owners shall have the option of substituting a similar Liberty steamer in a similar position, if this charter is so cancelled.

30. This contract is subject to the approval of the U. S. Maritime Commission."

13. Eastern and ATIC entered into said two voyage charters with knowledge of Clause 29. The voyages were commenced and completed after September 1, 1947, in accordance with the voyage charter terms, and the two vessels were thereupon redelivered to the Maritime Com-

mission under the bareboat charter without making any further voyages. Libelant suffered losses as a result of the two voyages and the redelivery expenses incident thereto.

14. After executing without protest Addendum No. 7, Eastern consistently accounted for additional hire in accordance with its terms. Not until more than seven years had elapsed, that is on February 19, 1955, did Eastern challenge the Addendum or the accounting thereunder.

Conclusions

On the foregoing facts my first conclusion is that, as plainly appears, the Commission always reserved the right, capriciously or otherwise, to terminate the period of use of any of the vessels. Neither in any statute or contract was there an express or implied restriction upon its power. Just as a landlord with a reserved power to terminate a lease has the right to do so even if his object is to re-let even to the same tenant at a higher rental, so the Commission had the right to terminate even if it hoped that the charterer would immediately re-charter on terms less favorable to the charterer. The argument to the contrary seems to me to have no weight. And even if it did have, the charterer, which was uncoerced, elected not to press the point when it executed Addendum No. 7.

My second conclusion is that Eastern has no special ground of complaint with respect to the effect of the termination upon its voyage charters with ATIC. These voyage charters were, it is true, approved by the Commission. But the voyage charters in the most explicit terms of Clause 29 recognized the Commission's right of termination. In approving the voyage charters the Commission approved them as they stood, with the Commission's right of termination expressly reserved.

The second cause of action of libel is dismissed on the merits.

/s/ C. WYZANSKI D. J.
United States District Judge

Volume I. Document 16

[Caption Omitted]

Final Judgment

[May 2, 1962]

WHEREAS the parties hereto have compromised and settled the THIRD separate cause of action set forth in the libel herein and the THIRD and FOURTH separate causes of action set forth in the cross-libel herein, and said settlement has been embodied in a consent decree heretofore approved and entered on March 26, 1962; and

WHEREAS the parties have stipulated cross-libelant's damages in the amount of $64,000 on said SECOND separate cause of action as set forth in the cross-libel herein; and

WHEREAS it appears to the Court from the pleadings, and exhibits on file, the Court having heard the arguments of counsel, and due deliberation having been had thereon, that there is no genuine issue as to any material fact and that cross-libelant is entitled to judgment on its SECOND separate cause of action as a matter of law; and

WHEREAS the Court has filed an opinion on January 15, 1962, and a supplementary opinion, including findings of fact and conclusions of law, on May 2, 1962; now, therefore, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

1. That the opinions of this Court heretofore filed on January 15, 1962, and on May 2, 1962, be and the same hereby are adopted as the Court's findings of fact and conclusions of law, pursuant to Rule 46½ of the Rules of Practice in Admiralty and Maritime Cases of the Supreme Court of the United States;

2. That there is no just reason for delay in entering final judgment upon the FIRST and SECOND separate causes of action set forth in the libel herein, and on the FIRST and

SECOND separate causes of action set forth in the cross-libel herein, and it is expressly directed that final judgment on said causes of action be entered;

3. That the FIRST separate cause of action set forth in the libel herein is dismissed on the merits;

4. That the SECOND separate cause of action set forth in the libel herein is dismissed on the merits;

5. That the FIRST separate cause of action set forth in the cross-libel herein is dismissed on the merits;

6. That judgment be entered in favor of cross-libelant United States of America on the SECOND separate cause of action set forth in the cross-libel herein in the sum of $64,000, together with interest at the rate of six percent (6%) per annum from the date of this decree, until paid, together with cross-libelant's costs to be taxed.

/s/ CHARLES E. WYZANSKI, JR.
United States District Judge

Dated: May 2, 1962

Volume II Exhibit E-1

[Caption Omitted]

AFFIDAVIT IN SUPPORT OF EXCEPTIVE ALLEGATIONS

Commonwealth of Massachusetts }
Suffolk } ss

Robert A. Caswell, being duly sworn, deposes and says:

1. I am assistant manager of the accounting department of Eastern Gas and Fuel Associates (hereinafter referred to as "the Company"), a trust organized under the laws of the State of Massachusetts. I have been associated with the Company for twenty-nine years and am familiar with the background of the facts set forth in this affidavit, which is submitted in support of exceptive allegations to the cross-libel of the United States in the above-entitled action.

2. The Company and the former United States Maritime Commission ("Maritime") as of October 1, 1946 entered into a bareboat charter, Contract No. MCc-41881, for the use of certain Government-owned vessels. The vessels were operated by the company's "Mystic Steamship Division".

Various addenda to this agreement were subsequently executed, affecting the number of vessels chartered and other terms. The charter provided for two types of hire, the first being described as "basic charter hire", which was fixed in the charter at 15 per cent of the unadjusted statutory sales price of each vessel, computed by Maritime under the Merchant Ship Sales Act of 1946. Basic hire was billed to the Company by Maritime and paid monthly in full in the amount of $707,794.90. Martime's auditors have received and approved these payments and have never made claim against the Company for basic charter hire in excess of that already paid. The first cause of

action of the cross-libel asserts that basic charter hire based on an assumed "world market charter hire rate" should have been $2,298,680.07. This amount is equal to 48.72 per cent of the statutory sales price of the vessels per annum.

3. In addition to basic charter hire, the charter provided that the Company would pay "additional charter hire" pursuant to section 709 of the Merchant Marine Act, 1936. This additional charter hire was payable out of "cumulative net voyage profits" earned from the operation of the vessels in excess of a return of 10 per cent on the Company's "capital necessarily employed" in the business of the chartered vessels. The Company periodically during the charter, and thereafter, submitted accountings of profits and losses on the basis of which tentative payments and credits of additional charter hire were made from time to time. Relevant provisions from the charter and the regulations relating to these payments are attached respectively as Attachments "A" and "B" to this affidavit. Additional charter hire was tentatively paid on account by the Company in the amount of $464,876.09. The Company contends that it has made overpayments of additional charter hire of approximately $280,000, and it seeks recovery thereof in its libel. The Government, however, disputes this and asserts three claims by cross-libel for additional charter hire which are described below.

4. The Company accountings for additional charter hire have been fully reviewed by Maritime's auditors and there is no major dispute with respect to the basic figures, *i.e.*, what items are properly expense, what are income, what figure represents capital necessarily employed, etc. The unsettled disputes involve only questions of statutory and contract interpretation.

5. Accountings for additional charter hire were prepared by the Company and audited by Maritime. These

accountings set forth separately, for purposes of computing additional charter hire, the results of operations of two vessels in the coastwise trade and operations of nine vessels in the offshore trade. The operations of the two coastwise vessels resulted in a loss of $6,186 in 1946 and a profit, subject to additional charter hire after allowable return of 10 per cent, of $29,405 in 1947. The regulations of Maritime, based on section 709 of the 1936 Act, permitted the loss in 1946 to be offset against the profit in 1947. The fourth cause of action in the cross-libel seems to assert that Maritime misinterpreted the statute in permitting the loss in 1946 to be offset against the profit in 1947.

6. The operation of the nine vessels in the offshore trade resulted in a loss of $5,033 in 1946 and a profit of $717,741 in 1947. The third cause of action in the cross-libel seems to be based upon the assertion that the offset of the 1947 profits and the 1946 losses was contrary to statute. The same issue is involved in the third cause of action as in the fourth cause of action, except that the latter concerns the operation of vessels in the coastwise trade and the former the operations of vessels in the offshore trade.

7. As noted above, operations in the offshore trade during the first eight months of 1947 showed a profit of $717,741. Section 709 of the Merchant Marine Act, 1936, provided that every charter made under the Act should contain a provision that the charterer pay additional charter hire equal to 50 per cent of the cumulative net voyage profit. Nevertheless, the charter provided that Maritime should share in these profits at progressive rates of 50, 75 and 90 per cent. This provision of the charter was protested by the industry when the charter was adopted, and clause 13 of the charter and the regulations of Maritime (quoted in the attachments hereto) reserved all disputes until final audit of the accountings. The claim for $63,430.59, set forth in the second cause of action of the cross-libel, assumes the right to recover at the

progressive rates of additional charter hire in excess of the rate prescribed by the statute.

8. The freight and charter rates negotiated by the Company for carriage of cargo on the chartered vessels were based on Maritime's 15 per cent basic charter rates and were in many cases required to be, and were, approved by Maritime. Two of the vessels were time chartered to the United States War Department, as follows:

Vessel	Delivery Date	Redelivery Date	Number of Days
SS ANDREW STEVENSON	January 8, 1947	April 25, 1948	108
SS JAMES BOWDOIN	March 13, 1947	June 11, 1947	91

These charters, pursuant to the clause quoted in Attachment "C" hereto, provided that the time charter rate, payable by the War Department, would be increased to compensate for any increase in the 15 per cent basic charter hire paid to Maritime.

(Signed) ROBERT A. CASWELL
Robert A. Caswell

Subscribed and sworn to before me this
29th day of September, 1960.

(Signed) WILLIAM M. BRADY
Notary Public

My Commission Expires December 13, 1963

[NOTE: Attachments A & B mentioned in the above affidavit have not been reproduced but are quoted in the brief where relevant. Attachment C appears *infra*, p. 97.]

Volume II Exhibit E-23

[Caption Omitted]

SUPPLEMENTAL AFFIDAVIT OF ROBERT A. CASWELL

Commonwealth of Massachusetts }
Suffolk } ss.

ROBERT A. CASWELL, being duly sworn, deposes and says:

1. I am Assistant Manager of the Accounting Department of Eastern Gas and Fuel Associates, a trust organized under the laws of the State of Massachusetts (hereinafter referred to as the "Company"). This affidavit supplements my prior affidavit sworn to herein on September 29, 1960.

2. My attention has been called to a statement of the position of the Government in connection with the sliding scale of additional charter hire set forth in its memorandum in opposition to cross-respondents' exceptions, pages 56-58, as follows:

> Section 709(a), by its terms, was operative only after the charterer's income had been used (1) to pay "the charter hire reserved in the charter"; (2) to pay "the charterer's fair and reasonable overhead expenses"; and (3) to pay the charterer a 10 percent return on his investment. Thus, section 709(a) did not restrict either the amount of "charter hire reserved in the charter," or the form or manner in which such contractual charter hire could be charged. Section 709 clearly contemplated two types of charter hire: a total *contractually* stipulated "charter hire" (whether a percentage of profits or a firm monthly rate or a combination of the two) in an amount unlimited by the terms of section 709(a), and the statutory "additional charter hire" of one-half of the excessive profits.

* * * * *

> It results that the combined firm or "basic hire" [15 percent of statutory sales price] and the 25 and 40 percent portions of [sliding scale] constituted the total "charter hire reserved in the charter" as referred to in section 709(a). Never has the Government contended that the 25 and 40 percent portions of the 75 percent and 90 percent sliding scale which Eastern Gas attacks was charged under section 709(a) or otherwise than under section 5(b).

The charter and the regulations are completely inconsistent with this statement of the Government's position. However, without accepting its correctness or validity, the accounting consequences that flow from it, if it be correct and lawful, are noted as follows:

3. Basic charter hire (fixed at 15 percent of statutory sales price, which the Company has paid in full) is an *expense of operation* which is properly deducted before computing "additional charter hire" which is paid out of profits. If, as the statements from the Government's brief suggest, the 25 and 40 percent portions of the sliding scale rates are treated as expense in the same manner as the 15 percent basic charter hire, those portions of sliding scale would likewise have to be computed and deducted as an expense before calculating the additional charter hire due at the 50 percent rate. Such procedure is not provided for in any accounting regulations or otherwise, and it was never so computed by the Company. However, the net result of treating the 25 and 40 percent portions of additional charter hire as an expense is to reduce the Company's liability for additional charter hire by $80,171.54, which is more than, and thus eliminates, the claim for additional charter hire of $63,430.59 at the sliding scale rates asserted by the Government in paragraph Twelfth of the cross-libel. It also eliminates the claim for $4,530.10 and $3,063.09, respectively, contained in paragraphs Seventeenth and Twenty-third of the cross-libel.

4. The audit report of the accountings of the Company made by the Maritime Administration, dated August 20, 1954, shows a computation of additional charter hire in the offshore trade, as follows:

SHIPSALESDEMISE-303—Dry Cargo, Offshore—
(1782 Terminated Days):

$178,200.00	at 50%	$ 89,100.00
356,400.00	at 75%	267,300.00
178,107.72	at 90%	160,296.95
$712,707.72		$516,696.95

The profit subject to additional charter hire, shown in the first column of this tabulation, is $712,707.72. The additional charter hire, computed at the sliding scale rates, shown in the second column, is $516,696.95. Of this latter figure, $356,353.86 constitutes additional charter hire at the 50 percent rate, and the balance of $160,343.09 constitutes additional charter hire at 25 and 40 percent sliding scale rates, which the Government's brief says is really "charter hire reserved in the charter" to be treated as an expense in the same manner as the 15 percent basic hire. Assuming this to be correct, the sum of $160,343.09 must be deducted as an expense before computing profit subject to additional charter hire at the 50 percent rate. Such a deduction reduces the profit subject to additional charter hire from $712,707.72, as shown above, to $552,364.63. Additional charter hire at 50 percent on this sum would equal $276,182.31.

5. The total charter hire thus due (other than basic hire at the rate of 15 percent of the statutory sales price, which has been paid in full), if the Government's theory is correct and in accordance with law, would be the sum of the following:

(a) 25 and 40 percent portions of sliding scale	$160,343.09
(b) 50 percent of net voyage profits after deduction of (1) basic 15 percent hire, and (2) 25 and 40 percent portions of sliding scale ("charter hire reserved in the charter")	276,182.31
	$436,525.40

As pointed out in my earlier affidavit, and in paragraph Twelfth of the cross-libel, the Company has already tentatively paid additional charter hire of $464,876.09, which exceeds the $436,525.40 shown above to be due on the accounting theory suggested in the Government's brief.

(Signed) ROBERT A. CASWELL
Robert A. Caswell

Subscribed and sworn to before me this
21st day of November, 1960.
WILLIAM M. BRADY
Notary Public

My Commission Expires December 13, 1963.

Volume II. Exhibit E-17
[Memoranda and Minutes of Maritime Commission Meetings]

[Memorandum of August 7, 1946 from Charter Section to Maritime Commission]

[To] United States Maritime Commission

[From] Acting Chief, Charter Section August 7, 1946

Report on WSA Interim Chartering and Recommendations in Connection With Maritime Commission Chartering Under the Ship Sales Act

Pending legal and functional abilities of the Maritime Commission to consummate sales first and charters secondly, the War Shipping Administration on April 15 inaugurated an interim charter program approved by the Maritime Commission, and delivered the first vessel on April 23, the date on which General Order No. 60 was published in the Federal Register.

It was hoped and expected by both the War Shipping Administration and the Maritime Commission that such interim chartering would cease on June 30 or one week after expiration of the 60 day period required by the Ship Sales Act before chartering could be effected. However, about the middle of June it became apparent that the Maritime Commisison was not ready for ship sales charters and arrangements were made with the Commission to continue chartering for delivery during the month of July. About July 15 the same situation and conditions obtained and arrangements were agreed whereby WSA would continue interim chartering for delivery during the month of August.

Through July 31, 604 vessels had been delivered to bareboat charterers, and for delivery during the month of August 196 vessels have already been committed, making a total of 800 vessels that will have been delivered by August 31 when WSA functions are absorbed by the Maritime Commission.

The following table shows the deliveries in each month broken down into the two main categories of charterers, namely, berth services and bulk operators; also the principal types of vessels chartered to each category.

Position as of August 6, 1946

	Liners					Bulk Carriers			
	C-Types	Vict	EC-2	Others*	Total	EC-2	Others**	Total	Grand Total
April	5	2	4	..	11	..	..	0	11
May	38	28	50	3	119	45	2	47	166
June	35	46	39	24	144	82	8	90	234
July	32	32	20	24	108	74	11	85	193
Aug. (estimated)	37	10	6	14	67	98	28	126	193
	147	118	119	65	449	299	49	384	797

* Includes 1 Victory comb. animal & cargo vessel
" 6 Liberty comb. animal & cargo vessel
" 1 Pass. ship (George Washington)
" 48 C1-M-AV1 type vessels
" 1 N-3 type vessel
" 2 R-2s
" 3 R1-M-AV3 type vessels
" 3 Reefers (United Fruit Co. type)

Total 65

** Includes 6 Victory types
" 3 C-Types
" 21 Vict Animal Carriers
" 1 C-4 Animal Carriers
" 6 Liberty Animal Carriers
" 8 C1-M-AV1 type vessels
" 4 C-2 Reefers

Total 49

The original charter plan was of an experimental nature to test the rate at which the government could get out of business, and at the beginning of the program in April prospective charterers were hesitant about chartering. To carry out the mandate of Congress to transfer vessel operation from government interest to private interest, the WSA persuaded a number of berth service charterers to abandon general agency operation in favor of bareboat chartering to cover their entire berth service requirements. Although several operators wished to retain general agency operation for government account parallel with private operation of their owned ships, this was disallowed for obvious reasons. At present every foreign trade berth

service, with the exception of one, is now operating for private account either with owned ships, bareboat chartered ships or a combination of both.

Preference in the number and type of vessels was given to the berth operators who owned vessels or had applications to purchase vessels. Due to the limitation on physical capabilities of delivering vessels, namely, about 200 ships per month, restrictions and quotas had to be established on the bulk operators for deliveries during June, July and August.

From the foregoing table it will be seen that during April, May and June vessels chartered to bulk operators amounted to only one-third of the total; during July about 46% of the total in that month and during August an estimated 70%. This is explained by the fact that most of the berth services will have had their tonnage requirements practically filled, so that from now on the largest portion of delivery capacity may be used for bulk cargo carriage which is by far the largest responsibility of WSA under the Government guarantee of tonnage for relief and rehabilitation programs. The other remaining government operation activities comprise military requirements, intercoastal and coastwise services, and the Alaskan trade. The Puerto Rican and Hawaiian services are under private operation including bareboat vessels, and there is some question about the financial results in the Puerto Rican service.

If the Commission's policy is to continue the process of getting the government out of business, it is presumed the principal objective is the sale of vessels and secondly, the bareboat charter of vessels. It will be noted that of the vessels under charter at the end of August, 150 are of the "C" type, most of which are covered by applications of American citizens for purchase. About 25 vessels of other types are also under charter to applicants for purchase of such vessels. Therefore about 150 of these vessels are under charter only because the Maritime Commission has not sold and delivered them.

There has been much discussion of the policy the Maritime Commission should adopt in respect of ship sales charters, particularly the basic charter rate and additional charter hire through recapture, and the financial requirements of bareboat charter applicants.

It is expected that bulk cargo requirements, particularly coal and grain from the United States for relief and rehabilitation purposes, will average about 300 cargoes per month between now and June 30, 1947. United States Government owned tonnage has had to be provided for at least 80% of this movement. During the month of July there were 289 coal cargoes and 79 grain cargoes, totalling 368 of which 66 were carried by foreign ships, and 302 by U. S. vessels. U. S. privately owned vessels carried six cargoes, bareboat chartered vessels carried 87 cargoes, and WSA General Agency ships carried 209 cargoes. A recapitulation table showing percentages follows:

July

	Coal		Grain	
	Ships	%	Ships	%
Foreign	43	.148	23	.291
U. S. Private	3	.011	3	.038
Bareboat	76	.263	11	.14
W.S.A.	167	.578	42	.531
	289	1.000%	79	1.000%

It is estimated that a total of between 300 and 400 Liberty type vessels will be required to carry the same proportion of such grain and coal cargoes as WSA carried during the month of July, namely about 200 cargoes. Assuming at least 200 vessels will be sold to foreign purchasers and delivered during the last four months of the calendar year (50 vessels per month), and that at least 200 vessels will be sold and delivered to American citizens during the same period (50 vessels per month), the survey and inventory

capabilities (estimated at 250 total vessels per month) allocable to bareboat chartering of ships would not exceed 150 vessels per month for such period beginning September 1st.

Again assuming that the ayerage of 50 vessels per month delivered to foreign purchasers would load coal or grain, the requirements for WSA ships for such cargoes would be reduced from 200 to 150 vessels per month—or about 250-300 vessels in continuous round trip operation. If 100 of an assumed 150 vessels delivered under bareboat charter per month were used for coal and grain cargoes, requirements for WSA General Agency ships for such cargoes would virtually be eliminated by December of this year, provided there are no large fluctuations in the cargo programs.

On the other hand if chartering were restricted and reversed by adoption of a policy of impractical and excessive recapture provisions or unnecessarily high financial requirements for bareboat charters, resulting in the redelivery during the September/November period of a large number of the 800 vessels under charter at August 31 (estimated about 100 vessels per month for delivery, excluding the approximate 200 to be sold to citizens), the extent of the retrogression, chaos and waste becomes apparent.

Grain, coal and other bulk commodities are not governed by conference rates but are open and governed by the laws of supply and demand. With foreign nations having more tonnage available through sales of U.S. vessels, it is natural that rates will decline from the levels which have in the past necessarily been set by WSA for vessels operated by WSA whose expense of operation is greater than that for privately operated vessels. It must be stressed that the voyage profits of the bulk operators are relatively low compared with those of most of the berth operators, and with an open world freight market on bulk cargoes, American bulk cargo operators should be offered the maximum

of opportunity in the private operation of war built ships as long as such ships are needed for world demands.

The rates on general cargo carried by the berth services are practically all governed by the respective line group conferences, and while many of the berth services are highly profitable with the full cargoes and rates prevailing today, some berth services in some of the trades are not highly remunerative but are fraught with both operating risks and traffic risks. While the number of risky or low remunerative berth services may be small at present, overtonnaging of the highly remunerative berth services is a real possibility which will have its effect upon earnings. To prevent excessive profits of bareboat vessels on highly remunerative berth services, it is not necessary to endanger American lines on the low remunerative berth services by imposing a high basic charter hire or a high percentage of straight recapture on all voyage profits.

RECOMMENDATIONS:

Therefore if the Maritime Commission is to adopt a sound policy and to undertake a successful chartering program thereunder consistent with the Ship Sales Act, the following is recommended:

1) Charter period about six months cancellable by either party on 15 days written notice.

2) Initial basic charter hire at the rate of 15% per annum on the unadjusted statutory sales price or the floor price on each vessel type whichever is the higher.

3) Additional charter hire to be:

(a) One-half of the average net voyage profit up to the first $200 per day ($100 each for Government and charterer, if earned) for the period under charter in excess of the 10% on the charterers capital necessarily employed in the business, and
(b) 90% of the excess over such $200 average net voyage profit per day.

4) Financial Requirements. (a) Net worth and net working capital of any charterer as determined by the Director of Finance (Operations) must be a minimum of $250,000 with which charterer may become eligible to bareboat charter up to a total of five vessels. (b) For each vessel in excess of 5 vessels, net working capital shall be increased by $25,000 each vessel. (c) A performance bond in the amount of $25,000 for each vessel under the fleet charter so that the cumulative amount of all bonds may be applicable to any ship or any event under the fleet charter.

5) Charterers must have the necessary ability, experience and character to qualify as determined by the Director of Operations and Traffic.

I have many times verbally explained the reasons and substantiations for the foregoing recommendations. In my opinion, the above recommendation for additional charter hire is the most effective way of preventing excessive profits at the same time offering the minimum which a bareboat charterer will accept. It will also prevent some of the Puerto Rican or other services from being thrown back to the Government, if basic hire or a higher rate of recapture is imposed. The profit risks of a bulk charterer are very real despite some ideas to the contrary, and the above plan has the distinct advantage over a straight 90 per cent recapture on all voyage profits, in that small voyage profits after a real risk are not confiscated. Comparative examples of the results of the proposals are as follows:

Liberty Type Vessels

		Division Under Fixed 90% Plan		Division Under Subject Plan		Initial Charter Hire to Gov't
Voy. Days	Voy. Profit	Charterer	Gov't	Charterer	Gov't	
30	1500	150	1350	750	750	8000
30	3000	300	2700	1500	1500	8000
30	6000	600	5400	3000	3000	8000
30	12000	1200	10800	3600	8400	8000
30	24000	2400	21600	4800	19200	8000
30	48000	4800	43200	7200	41800	8000
30	96000	9600	86400	12000	84000	8000

The foregoing recommendations are made with the view of

1) Stimulating sales to the maximum;

2) offering the charterer minimum terms acceptable;

3) preventing excess profits on highly lucrative special trades or berth cargo services without handicapping the low remunerative berth services; and

4) getting the Government out of the ship operating business.

For the reasons stated above, as a member of the Committee on charter policy and as Acting Chief of the Charter Section, I do not concur with the recommendations which I understand Commissioner McKeough, Mr. Skinner, Mr. Quinn and Mr. McDaniel are submitting as members of the Committee resulting from the Commission meeting on August 2 to which I was designated a member.

I also wish to stress the fact that unless these issues are determined very promptly and the machinery set in motion immediately under simplified procedure enabling the Chartering Section to secure prompt Commission approval of prospective charterers, deliveries during the month of September will be very limited and will not meet the chartering potential of qualified applicants.

In my opinion there is insufficient time to effect full September deliveries under the procedure presently set up under General Order No. 60 and Administrative Order 101, involving the processing and approval by the Commission of applications by each of about 60 prospective applicants. A recommendation to revise Administrative procedures will be submitted immediately.

/s/ D. B. DONALD
Dudley B. Donald
Acting Chief
Chartering Section

I CONCUR:
/s/ C. G. CORNWELL
C. G. Cornwell

[Memorandum of August 8, 1946 to Maritime Commission]

[To] United States Maritime Commission

[From] Special Charter Committee August 8, 1946

Interim Chartering Under Merchant Ship Sales Act of 1946

This Committee was appointed by the Commission at its regular meeting of July 30, 1946 for the purpose of making further study and submitting a report in connection with the above subject. This matter has been the subject of two memoranda to the Commission, one dated July 19, 1946 from another Special Committee and the other dated July 29, 1946 from Mr. Cornwell, Chairman of said Committee.

We have had a number of conferences in connection with this matter and have interviewed what might be termed a cross section of the Charterers involved.

BACKGROUND

The Agency Agreements were inaugurated during the War and hundreds of Government owned and chartered vessels were operated under these agreements for account of the War Shipping Administration. The vessels operated during this period carried government cargoes to a great extent. Under this arrangement the Agent collects all voyage revenues and pays all operating expenses on behalf of the War Shipping Administration for which the Agent receives a return for its services in the nature of fees and commissions.

There are now large cargoes moving on the berth services, both commercial and government cargoes are involved. There also are bulk cargoes, mostly coal and grain moving in both the "liner" and the "non-liner" services. UNRA and some of the foreign governments are the largest shippers of the bulk cargoes. The freight rates generally are high, very much higher than before the War.

The "war-built" vessels could not be chartered under the Merchant Ship Sales Act of 1946 until 60 days after April 23, 1946, as of which date there were published in the Federal Register the Statutory Sales Prices of the majority of the vessels of standard design. The War Shipping Administration began interim chartering as of April 16, 1946, thereafter withdrawing such of its vessels from the Agency agreements as there were Charterers to take them over.

The basic charter rate being charged by the War Shipping Administration is 15% of the mean of the Statutory Sales Price, unadjusted, and the floor price, plus the statutory additional charter hire of 50% of profits in excess of 10% of Capital necessarily employed in the business. While no formal statements of voyage operation have been submitted by these Charterers, sufficient data have been submitted informally to satisfy the majority of the Committee that the profits accruing to the Charterers generally have been exorbitant, *particularly in relation to the Capital employed in the business.* It also is generally conceded that a continuation of the agency operations would have been more profitable to the Government financially.

It is not believed that the Charterers handling bulk cargoes altogether will buy vessels for engaging in this class of operation permanently. Hence the adoption of charter operation over agency operation in this class of service, in our opinion, will avail the Commission nothing in selling its "war-built" vessels. Moreover, it would seem that any contention that a Charterer, during the emergency period of operation, would improve the Charterer's capital position sufficiently to enable him to buy, even one ship, for operation in any service would be an admission that more than a reasonable and equitable profit under said charter was expected.

It is the opinion of the majority of this Committee that it would have been in the public interest and in no way

detrimental to ultimate private ownership and operation if the War Shipping Administration had (a) continued during the emergency, with agency operation in the movement of all bulk cargoes and also such general cargoes as are moving outside of the area covered by liner-service operation, except, of course, such as those cargoes, if any, as could have been handled by American flag vessels owned by independent operators and (b) chartered to liner-service operators on a short term basis, at rates calculated to net only a reasonable profit to the charterer—sufficient vessels to augment said operators' fleet of owned vessels (pending the purchase and delivery of the required additional "war-built" vessels) necessary to move all general cargo moving over their respective berth services. In this way it is felt that the Government would have been taking care of the overall problem occasioned by post war emergency, in the most economical and feasible way open to it. This is especially true, in view of the fact that the greater percentage of the available cargo now moving under charter party agreement is of a relief nature.

Under the terms of our fiscal 1947 Appropriation Act, for the first six months of the current fiscal year, only $401,000,000. of the voyage revenues can be disbursed for operating expenses under the general agency agreements. As the change from agency to charter operations takes place, it necessitates inventories and surveys. Likewise, if the change is from charter to agency operation, inventories and surveys are required. While the interested Divisions inform us that they handle about two hundred ships per month with their present personnel, the matter of inventories and surveys would be a real handicap in a speedy and complete change from one type of operation to the other. All of these facts, in the opinion of this Committee, make it necessary for the Commission to continue with interim chartering.

Financial Requirements

The Commission already has approved financial requirements of charterers with respect to long-term charters. The Director of Finance, Operations, has recommended some relaxation of these requirements as covered by Exhibit "B" attached and a majority of this Committee concurs in his recommendation. The Director of Finance, Operations, estimates that approximately 70 vessels now under War Shipping Administration charter will be returned to the Government when the charterers are called upon to meet these proposed financial requirements. It is believed that such vessels as are surrendered by charterers as a result of the Commission invoking financial requirements, as amended, not heretofore in effect will be absorbed by one or more of the following: (a) other Charterers with the necessary financial requirements, (b) berth operators handling bulk cargoes within their respective areas and (c) General Agents, if necessary, within the limits of our appropriation.

Present Cargo Fleet

As of July 31, 1946 there were the following American flag ocean-going vessels being operated in the domestic and foreign services.

Privately owned vessels	349
Government owned, Bareboat Charter	585
" " , General Agency	1447
Total	2381

Rates

The Committee is informed that there are certain types of "war-built" vessels available for charter that will not warrant a higher basic rate than 15% of the sales price. We also are informed that equitable basic rates in the various foreign trades will differ materially. Generally, the

basic charter rate of 15% of the sales price is below the world market charter rate and, therefore, is not consistent with the policies of the Merchant Ship Sales Act 1946. However, except for one of our Committee members, it, in our opinion, would not be practicable at this stage of interim chartering to increase basic rates to what would appear to be the world market rates. As interim chartering has arisen from an emergency condition, we believe that the most practical way, under the circumstance, to achieve our major objective (more equitable charter hire and to reduce excessive charter profits to the charterer) would be to increase the present 50-50 division of the profits over 10% per annum of the Capital necessarily employed in the business, which increase we shall cover more fully in our recommendation.

All of the Committee members, except one, agree that the additional charter hire of 50% of the profits in excess of 10% of Capital necessarily employed in the business should be increased. A minority of the Committee, however, feel that the revised percentage being recommended is too high.

It is the opinion of the majority, that such vessels, now under charter, as are surrendered by reason of increased charter hire will be absorbed by increased sales and/or through the methods outlined under "Financial Requirements." It should be stressed at this juncture that, in our opinion, less attractive charters will increase our overall sales substantially, perhaps sufficient in number to equal or exceed the total of all vessels, now under charter, as hereafter may be surrendered because of increased charter hire.

Cattle Cargoes

We are informed that there are approximately 80 vessels chartered for the transportation of UNRA cattle cargoes, which are vessels not included in figures included above under the caption "Present Fleet". We also are informed

that the same charter rates are in force under these charters as are in effect with all other interim charters, but that UNRA has an agreement with the charterer pursuant to which it receives a percentage of the Charterer's profit remaining after payment of all charter hire due War Shipping Administration. This class of charters, therefore, constitutes a problem, that, in our opinion, should be dealt with separately as soon as the major problem has been disposed of.

RECOMMENDATION:

It is recommended that the Commission:

1. (a) Direct that on and after September 1, 1946, all vessels delivered or redelivered under charter shall be under the Merchant Ship Sales Act of 1946 fleet charter, hereinafter referred to;

(b) All vessels now under charter with voyages terminating on and after August 25, 1946 shall be placed under the aforementioned fleet charter if continued in operation by the then charterer.

(c) Applications for fleet charters shall be filed pursuant to General Order No. 60, as amended.

(d) Until the merger of War Shipping Administration and the Maritime Commission September 1, 1946 applications for charter agreements shall be filed with the Operating Contracts Division, of the War Shipping Administration, which is authorized to process the applications pursuant to General Order No. 60.

2. Adopt Supplement No. 1 to Administrative Order 101 form (*Exhibit "A"*) attached hereto to permit expeditious handling of spot short-term chartering under the Merchant Ship Sales Act of 1946.

3. The period during which interim charters may be made under fleet charter party shall not extend beyond

..... Each fleet charter shall be for a period of six months and the period for which individual charters may be made pursuant to the fleet charter shall not be for a period in excess of approximately six months.

4. The basic charter rate shall be 15% per annum of the Statutory Sales Price, unadjusted, or the floor price, whichever is the higher, and the additional charter hire shall be 90% of the profit on all voyages during the interim charter period, in excess of 10% per annum of capital necessarily employed in the business, as determined by the Commission.

5. Approve the financial requirements of charterers with respect to interim charters as embodied in (*Exhibit "B"*) attached.

6. There shall be no sub-time chartering of vessels bareboat chartered to the Commission without the prior approval of the Commission, which approval, if granted, will be only under exceptional circumstances for a single round voyage basis at current market time charter rates for American vessels as determined by the Commission.

7. Direct that a wire, as per (*Exhibit "C"*) attached, be sent to each charterer immediately.

8. The present charter policy of the War Shipping Administration be modified to the extent that the Commission will charter to berth operators vessels for moving emergency bulk cargoes within their respective areas, if necessary, in order to meet any disability of Charterers arising from changes in our chartering policy.

9. That this Committee be required to submit a supplemental recommendation as soon as possible with respect to cattle cargoes referred to in the body of this memorandum.

10. There shall be included in each fleet charter a 15 day cancellation clause with respect to each fleet charter.

11. Direct the General Counsel, after clearance with the Director of Finance, Operations, and the Director, Operating Contracts Division, to submit to the Commission for approval a proforma fleet charter as referred to in No. "1" above.

12. Direct that a press release, after clearance with interested Divisions, outlining concisely the Commission's policy with respect to interim chartering on and after September 1, 1946 be issued immediately on adoption.

Attachments:

/s/ R. S. McKeough	.....
Raymond S. McKeough	F. M. Darr
/s/ J. J. Quinn	.....
J. M. Quinn	Dudley Donald
/s/ Wade S. Skinner	.....
Wade Skinner	Paul Sullivan
/s/ C. H. McDaniel	Has concurred in minority
C. H. McDaniel	report of Mr. Dudley Donald
	C. G. Cornwell

EXHIBIT A

UNITED STATES MARITIME COMMISSION Washington	WAR SHIPPING ADMINISTRATION Washington
ADMINISTRATIVE ORDER 101 Supplement No. 1	ADMINISTRATIVE ORDER 87 Supplement No. 1

Subject: Administration of Merchant Ship Sales Act of 1946 (Fleet Chartering)

All of the provisions of United States Maritime Commission Administrative Order 101 and War Shipping Administration Administrative Order 87, and all supplements with respect to both or either of these orders, in respect to the responsibility of the various divisions of the Maritime Commission in the administration of the Merchant Ship Sales Act of 1946 in accordance with the Commission's General Order 60 (11 F.R. 4459) shall be applicable to all applications to fleet charter, except to the extent the provisions of this supplement are inconsistent therewith in which case the provisions of the suplement shall be controlling. These applications for fleet charters will be filed in accordance with Sections 299.31 and 299.81 of General Order 60.

The Division of Operations and Traffic is authorized and directed:

(A) To receive and process all applications received in connection with the fleet chartering of vessels under the provisions of Section 299.31 and Section 299.81 of the Commission's General Order 60:

(B) To prepare and transmit to the Commission reports and recommendations with respect to the determinations to be made and the action to be taken by the Commisison in connection with such applications, provided, that in all cases, the Division of Operations and Traffic shall obtain the comments of the Legal Division, the Division of Finance for Operations and the Division of Large Vessel Sales. Wherever the applicant is a subsidized operator, the comments of the Division of Government Aids also shall be obtained.

(C) To assign or allocate individual vessels which upon being so allocated shall be delivered in accordance with paragraph 4(a)(3), (4) and (6) of Administrative Order 101 to approved fleet charterers without prior approval of the Commission to the extent which prequalification has

been established provided (1) such assignments or allocation will not cause the total number of vessels under such fleet charter to exceed the maximum number authorized by the Commission, (2) the sale or long term charter of such vessels has not been authorized by the Commission and there is no bona fide application by a Citizen of the United States pending in said Division for the sale or long term charter of said vessel, the consummation of which would, in the opinion of the Director of said Division, be adversely affected by the assignment or allocation of the vessel under a fleet charter, and (3) such vessel either is in class and good operating condition or does not require, in the opinion of the Director, Division of Maintenance and Repair, the expenditure for the purpose of putting it in class and good operating condition of more than $50,000.

No assignment or allocation shall be made to an operator holding an operating-differential subsidy agreement with the Commission without the prior concurrence of the Director, Division of Government Aids, and the General Counsel.

EXHIBIT B

Insofar as relaxation of the minimum financial requirements prescribed in General Order No. 60, Supplement No. 2 are concerned, the Director of Finance for Operations has indicated that, in the application of these requirements to the proposed "fleet charter" program, he is prepared (pursuant to paragraph (c) of Section 299.9 *Exceptions and Exemptions to Rules and Regulations* of General Order No. 60, Supplement No. 2) to recommend the following:

1. Upon the premise that vessels allocated under fleet charters will not be so allocated for a period in excess of six months;

   (a) the working capital requirements prescribed in paragraph (a)(2)(i) of Section 299.31 may be reduced so as to include prepaid insurance for a

period of six months rather than for a period of one year,

(b) the net worth requirements prescribed in paragraph (a)(2)(ii) of Section 299.31 may be reduced so as to include basic charter hire for a period of six months rather than for a period of one year, and

2. That the minimum financial requirements as modified in paragraph numbered "1" above be further reduced by the application of the following "quantity reduction percentages" in instances where the charterers thereby would be eligible for the allocation of more than five vessels:

First five vessels	—	no reduction
Six to ten vessels, inclusive	—	reduce requirements 25%
Eleven to fifteen vessels, inclusive	—	reduce requirements 50%
All over fifteen vessels	—	reduce requirements 75%

EXHIBIT C

JOINT TELEGRAM OF CHAIRMAN, MARITIME COMMISSION AND ADMINISTRATOR, WAR SHIPPING ADMINISTRATION TO COMPANIES HAVING BAREBOAT CHARTERS

ALL WAR-BUILT VESSELS HEREAFTER CHARTERED FOR DELIVERY ON AND AFTER SEPTEMBER 1, 1946 WILL BE CHARTERED BY THE MARITIME COMMISSION PURSUANT TO THE PROVISIONS OF THE MERCHANT SHIP SALES ACT OF 1946. THE FORM OF CHARTER TO BE MADE EXCEPT FOR LONG TERM CHARTERS WILL BE SUBSTANTIALLY THE W.S.A. WARSHIPDEMISEOUT 203 FORM ADAPTED TO CONFORM TO THE REQUIREMENTS OF THE MERCHANT SHIP SALES ACT OF 1946 WITH THE FOLLOWING SPECIFIC MODIFICATIONS:

1. THE PERIOD OF THE CHARTER SHALL BE ABOUT SIX MONTHS WITH PROVISIONS FOR FIFTEEN DAY CANCELLATION BY EITHER PARTY.

2. THE RATE OF BASIC HIRE WILL BE AT RATE OF FIFTEEN PERCENT PER ANNUM OF EITHER THE UNADJUSTED STATUTORY SALES PRICE OR THE FLOOR PRICE OF THE VESSEL, WHICHEVER IS HIGHER.

3. THE ADDITIONAL CHARTER HIRE PAYABLE TO THE OWNER WILL BE NINETY PERCENT OF THE NET VOYAGE PROFIT IN EXCESS OF THE TEN PERCENT PER ANNUM ON CHARTERER'S CAPITAL NECESSARILY EMPLOYED INSTEAD OF FIFTY PERCENT AS HERETOFORE.

4. THE MINIMUM FINANCIAL REQUIREMENTS PRESCRIBED IN GENERAL ORDER NO. 60, SUPPLEMENT 2 HAVE BEEN MODIFIED AS FOLLOWS:

(a) WORKING CAPITAL REQUIREMENTS WILL BE REDUCED SO AS TO INCLUDE PREPAID INSURANCE ONLY FOR A PERIOD OF SIX MONTHS.

(b) NET WORTH REQUIREMENTS WILL BE REDUCED SO AS TO INCLUDE BASIC CHARTER HIRE ONLY FOR A PERIOD OF SIX MONTHS.

(c) AS SO MODIFIED, MINIMUM FINANCIAL REQUIREMENTS FOR IN EXCESS OF FIVE VESSELS WILL BE FURTHER REDUCED AS FOLLOWS:

SIX TO TEN VESSELS, INCLUSIVE	25 PER CENT
ELEVEN TO FIFTEEN VESSELS, INCLUSIVE	50 PER CENT
ALL OVER FIFTEEN VESSELS	75 PER CENT

ALL DELIVERIES UNDER BAREBOAT CHARTER DURING THE MONTH OF AUGUST WILL BE ON THE REGULAR W.S.A. WARSHIP-DEMISEOUT 203 FORM OF CHARTER WITH THE PRESENT CHARTER RATE.

WITH RESPECT TO VESSELS NOW UNDER W.S.A. INTERIM BAREBOAT CHARTERS WHOSE VOYAGES TERMINATE ON OR AFTER AUGUST 25 THIS TELEGRAM SHALL BE DEEMED TO BE THE OWNER'S FIFTEEN DAYS' NOTICE OF CANCELLATION PURSUANT TO CLAUSE FOURTEEN OF THE INTERIM BAREBOAT CHARTER. ACTUAL REDELIVERY WILL NOT BE TAKEN OF SUCH VESSELS, HOWEVER, IF THE CHARTERER DESIRES TO CONTINUE SUCH VESSELS UNDER THE MARITIME COMMISSION FORM OF CHARTER ABOVE OUTLINED.

TELEGRAPHIC OR WRITTEN ACCEPTANCE ADDRESSED TO SECRETARY, MARITIME COMMISSION, OF THE CONDITIONS OF THE MARITIME COMMISSION FORM OF CHARTER AS ABOVE OUTLINED MUST BE RECEIVED WITHIN FIVE DAYS FROM DATE.

WITH RESPECT TO VESSELS NOW UNDER W.S.A. INTERIM BAREBOAT CHARTERS WHOSE VOYAGES TERMINE PRIOR TO AUGUST 25, THE GOVERNMENT WILL ACCEPT REDELIVERY AT THE TERMINATION OF THE VOYAGE AND WILL WAIVE THE FIFTEEN DAYS' NOTICE OF CANCELLATION REQUIRED BY THE CHARTER IN ANY SUCH CASE. IF THE CHARTERER WISHES TO CONTINUE UNDER SUCH CHARTER FOR ANOTHER VOYAGE, THEN THIS TELE-

GRAM SHALL BE DEEMED TO BE THE OWNER'S FIFTEEN DAYS' NOTICE OF CANCELLATION PURSUANT TO CLAUSE FOURTEEN OF THE CHARTER AND REDELIVERY WILL BE TAKEN PURSUANT TO THE CHARTER PROVISIONS ON THE NEXT VOYAGE TERMINATION.

EXCEPTED FROM THE FOREGOING ARE COMMITMENTS OR CHARTERS WITH RESPECT TO ANIMAL CARRYING VESSELS WHICH WILL BE THE SUBJECT OF SPECIAL ARRANGEMENTS.

[Minutes of Maritime Commission for August 9, 1946 Concerning Charter Hire—Pages Nos. 37218-37222]

Commissioner McKeough spoke first in a preliminary statement in support of the majority report of the Committee.

Chairman Smith expressed himself as not favoring the proposal of the majority report in view of the risks which the charterer must assume.

Commissioner Mellen then spoke briefly with reference to the financial phases of the three reports, requesting an explanation of the meaning of the term "capital necessarily employed". He asked for specific examples of the result of the financial requirements as proposed by Mr. Quinn, based on a Liberty LC2 type vessel.

At this point Chairman Smith withdrew from the meeting at 11:00 A.M., whereupon Vice Chairman Carmody assumed the chair.

In answer to Commissioner Mellen's request, Mr. Quinn explained that the "capital necessarily employed" for earning purposes would be deemed to be not in excess of an amount equal to the basic charter hire. Elaborating on this statement, Mr. Quinn explained that on a Liberty type vessel the basic charter hire would be approximately $8,000.00 per month—$48,000.00 for six months—$96,000.00 per annum—and that 10% thereof would be $800.00 per month. To the extent earned, profits up to an amount equal to 10% of the basic charter hire would be retained by the Charterer before the division of profits in excess of 10% per annum of "capital employed". On an annual basis this

would amount to $9,600.00 in the foregoing example. If, however, the net worth requirements are reduced 50% under the proposed "fleet charters" to be for a period of about six month, the profits to be retained by the charterer (before division of profits in excess of 10% per annum of "capital employed") would be at the rate of 10% per annum on such *reduced* net worth requirements. In the foregoing example this would amount to $2,400.00, i.e., 5% (for six months) of $48,000.00, or $400.00 per month.

Commissioner Mellen then requested a definition of the meaning of "net worth" and several explanations were given by Messrs. Quinn and McDaniel as follows:

Net worth is

(1) capital plus surplus
or
(2) total assets over total liabilities
or
(3) paid in capital plus surplus
or
(4) net investment of stockholders

In further explanation of the proposal of the above-quoted majority report of the Committee, Commissioner McKeough discussed the report at great length, pointing out that what the Committee was endeavoring to do was to try to correct a situation where charterers with a low capital investment would earn exceptionally high profits.

Mr. Donald in explanation of his above-quoted report pointed out that a vessel under General Agency Agreement would earn $1925.00 on a 45 day voyage whether the vessel makes or loses money. All losses are assumed by the War Shipping Administration. He compared this figure with the amount which a charterer could earn with a similar vessel under the charter rate recommended by him.

Mr. Darr stated that with sales of ships being made to foreigners at a rapid rate the world market would be nec-

essarily affected by low charter rates which foreign competitors have indicated will be placed in effect.

[Minutes, page 37219]

Then followed a general discusison of the tabulation appearing on Page 5 of the foregoing memorandum from Dudley B. Donald, Acting Chief, Chartering Section, and it was pointed out that the figures shown under the heading "Division under fixed 90% plan, charterer" should be increased by $800 to reflect 10% profit of the charterer based on capital necessarily employed.

Commissioner Parkhurst suggested that by reference to the report of Mr. Cornwell of July 29, 1946, which is spread in the minutes of the special meeting of July 31; 1946, a compromise might be reached between the 66⅔% recapture referred to in that report and the above-quoted majority and minority reports. A general discussion on this point followed.

Chairman Smith re-entered the meeting at 12:10 P.M., and assumed the chair.

Commissioner McKeough then referred to a specific example of an operator of a liner service which had earned approximately $753,000 for a 60 day period with a fleet of 21 ships under a War Shipping Administration interim charter, and earned approximately $338,000 over and above 10% of the capital necessarily employed.

At this point Chairman Smith withdrew from the meeting at 12:25 P.M., and Vice Chairman Carmody assumed the chair.

The Commission, by the unanimous "yea" vote of the members present recessed at 12:30 P.M., until 2:30 P.M.

The Commission reconvened at 2:30 P.M.

Present Chairman Smith and Commissioners Carmody, McKeough, Mellen and Parkhurst.

Also Present: S. D. Schell, Executive Director; Wade H. Skinner, General Counsel; G. H. Halmbold, Director, Division of Operations and Traffic; Dudley B. Donald, Acting Chief, Chartering Section, Division of Operations and Traffic; F. M. Darr, Director, Division of Traffic, War Shipping Administration; Huntington T. Morse, Assistant to Chairman; P. A. Sullivan, Director, Division of Operating Contracts, War Shipping Administration; Charles D. Marshall, Assistant to Commissioner Parkhurst; Joseph Friedlander, Chartering Section, Division of Operations and Traffic; C. H. McDaniel, Director, Division of Government Aids; J. M. Quinn, Director of Finance for Operations; Kurt Nathan, Assistant to Commissioner Carmody; Stephen C. Manning, Jr., Acting Director, Division of Information; C. G. Cornwell, Director, Division of Large Vessel Sales; Julius J. Rosenberg, Executive Assistant to Administrator Conway, War Shipping Administration; and A. J. Williams, Secretary.

[Minutes, page 37220]

Memorandum of Appreciation to Admiral E. J. Moran, Assistant Deputy Administrator for Charters and Valuations, War Shipping Administration

There was presented the following proposed memorandum from Chairman Smith to Admiral E. J. Moran, Assistant Deputy Administrator for Charters and Valuations, War Shipping Administration:

"The Commission appreciates that you wish to return to your private business, and is greatly indebted to you for the services you have performed for the Commission while you have served as Assistant Deputy Administrator for Charters and Valuations of the War Shipping Administration. As you are aware, the functions of the War Shipping Administration will be transferred to the Commission as of September 1.

If agreeable to you, the Commission would like to feel that we could call upon you as the occasion may warrant for consultation in regard to matters which you have been handling and with which you are thoroughly familiar concerning which questions may arise in the future.

W. W. SMITH
Chairman"

After discusison, by the unanimous "yea" vote of the members of the Commission, the foregoing memorandum was approved and the Chairman was authorized to sign and send it to Admiral Moran.

Chartering Under Merchant Ship Sales Act of 1946—Supplement No. 1 to Administrative Order 101

The Commission again considered the matter of "Chartering under Merchant Ship Sales Act of 1946—Supplement No. 1 to Administrative Order 101", which was considered at the morning session of this meeting.

Mr. Darr informed the Commission that he had given considerable thought to the majority and minority reports quoted above, and felt that the differences could possibly be reconciled by modifying the minority reports of Mr. Donald by changing the additional charter hire to be (a) one-half of the average net voyage profit up to the first $150 per day ($75 each for Government and charterer, if earned) for the period under charter in excess of the 10% of the charterer's capital necessarily employed in the business, and (b) 75% of the next $150 per day of net voyage profits, and (c) 90% of the excess over such $300 average net voyage profit per day. Mr. Darr stated that this compromise was agreeable with Messrs. Sullivan, Donald, Cornwell and himself.

The Commission then proceeded to analyze the possible results of the formula suggested by Mr. Darr based on a 60 day voyage with a $20,000 profit. Commissioner McKeough on behalf of the majority group then made the following offer for additional charter hire:

> One-half of the average net voyage profit up to the first $150 per day ($75 each for Government and charterer, if earned) for the period under charter in excess of the 10% of the charterer's capital necessarily employed in the business, and 90% of the excess over such $150 average net voyage profit per day.

A general discussion followed with respect to Commissioner McKeough's formula which was analyzed in great detail.

[Minutes, page 37221]

Commissioner Mellen then suggested the following formula with respect to additional charter hire:

(a) One-half of the average net voyage profit up to the first $100 per day in excess of 10% of the charterer's capital necessarily employed in the business, and

(b) 75% of the next $200 per day, and

(c) 90% of all voyage profits in excess of $300 per day.

Then followed a lengthy discussion with respect to the formula of Commissioner Mellen which was analyzed and compared with the formulas submitted by all parties.

A calculation of the results of each formula was made on the basis of a 60 day voyage resulting in a $20,000 profit, if earned, and the results were discussed at great length.

After further discussion, by unanimous "yea" vote, the Commission took the following action:

Approved the recommendations contained in the foregoing memorandum from the Special Charter Committee dated August 8, 1946 (majority group) with (a) substitution of the words "Division of Operations and Traffic, United States Maritime Commission" in place of "Operating Contracts Division of the War Shipping Administration" in Paragraph 1 (d); (b) elimination of the word "interim" and the addition of the date "August 31, 1946," in Paragraph 3; (c) substitution of the following in place of Paragraph 4:

"4. Initial basic charter hire shall be at the rate of 15% per annum on the unadjusted statutory sales price, or the floor price on each vessel type, whichever is the higher. Additional charter hire to be (a) one-half of the average net voyage profit up to the first $100 per day in excess of 10% of the charterer's capital necessarily employed in the business, and (b) 75% of the next $200 per day, and (c) 90% of all voyage profits in excess of $300 per day."

Approved, subject to approval by the Administrator, War Shipping Administration, adoption of Supplement No. 1 to United States Maritime Commission Administrative Order 101,—War Shipping Administration Administrative Order 87, Supplement 1, as above set forth.

Approved the following revised telegram to companies having bareboat charters with the War Shipping Administration:

"ALL WAR-BUILT VESSELS HEREAFTER CHARTERED AND DELIVERED ON AND AFTER AUGUST 31, 1946 WILL BE CHARTERED BY THE MARITIME COMMISSION PURSUANT TO THE PROVISIONS OF THE MERCHANT SHIP SALES ACT OF 1946. THE FORM OF FLEET CHARTER TO BE MADE EXCEPT FOR LONG TERM CHARTERS WILL BE SUBSTANTIALLY THE W.S.A. WARSHIPDEMISEOUT 203 FORM ADAPTED TO CONFORM TO THE REQUIREMENTS OF THE MERCHANT SHIP SALES ACT OF 1946 WITH THE FOLLOWING SPECIFIC MODIFICATIONS:

1. THE PERIOD OF THE CHARTER SHALL BE ABOUT SIX MONTHS WITH PROVISIONS FOR FIFTEEN DAY CANCELLATION BY EITHER PARTY.

2. THE RATE OF BASIC HIRE WILL BE AT RATE OF FIFTEEN PER CENT PER ANNUM OF EITHER THE UNADJUSTED STATUTORY SALES PRICE OR THE FLOOR PRICE OF THE VESSEL, WHICHEVER IS HIGHER.

3. THE ADDITIONAL CHARTER HIRE PAYABLE UNDER AND DURING THE PERIOD OF THE FLEET CHARTER SHALL BE (a) 50 PER CENT OF THE AVERAGE NET VOYAGE PROFIT UP TO THE FIRST $100 PER DAY IN EXCESS OF

[Minutes, page 37222]

10 PER CENT OF CHARTERER'S CAPITAL NECESSARILY EMPLOYED IN THE BUSINESS, AND (b) 75 PER CENT OF THE NEXT $200 PER DAY, AND (c) 90 PER CENT OF ALL NET VOYAGE PROFITS IN EXCESS OF $300 PER DAY.

4. THE MINIMUM FINANCIAL REQUIREMENTS PRESCRIBED IN GENERAL ORDER NO. 60, SUPPLEMENT #2 HAVE BEEN MODIFIED AS FOLLOWS:

(a) WORKING CAPITAL REQUIREMENTS WILL BE REDUCED SO AS TO INCLUDE PREPAID INSURANCE ONLY FOR A PERIOD OF SIX MONTHS.

(b) NET WORTH REQUIREMENTS WILL BE REDUCED SO AS TO INCLUDE BASIC CHARTER HIRE ONLY FOR A PERIOD OF SIX MONTHS.

(c) AS SO MODIFIED, MINIMUM FINANCIAL REQUIREMENTS FOR IN EXCESS OF FIVE VESSELS WILL BE FURTHER REDUCED AS FOLLOWS:

SIXTH TO TENTH VESSEL, INCLUSIVE, 25 PERCENT
ELEVENTH TO FIFTEEN VESSEL, INCLUSIVE, 50 PERCENT
ALL OVER FIFTEEN VESSELS, 75 PERCENT

"ALL DELIVERIES UNDER BAREBOAT CHARTER DURING THE MONTH OF AUGUST WILL BE ON THE REGULAR W.S.A. WARSHIPDEMISEOUT 203 FORM OF CHARTER WITH THE PRESENT CHARTER RATE.

"WITH RESPECT TO VESSELS NOW UNDER W.S.A. INTERIM BAREBOAT CHARTERS WHOSE VOYAGES TERMINATE ON OR AFTER AUGUST 31, THIS TELEGRAM SHALL BE DEEMED TO BE THE OWNER'S FIFTEEN DAYS' NOTICE OF CANCELLATION PURSUANT TO CLAUSE FOURTEEN OF THE INTERIM BAREBOAT CHARTER. WITH RESPECT TO VESSELS NOW UNDER W.S.A. INTERIM BAREBOAT CHARTERS WHOSE VOYAGES TERMINATE PRIOR TO AUGUST 31, THIS TELEGRAM SHALL

ALSO BE DEEMED TO BE THE OWNER'S FIFTEEN DAYS' NOTICE OF CANCELLATION PURSUANT TO CLAUSE FOURTEEN OF THE CHARTER AND REDELIVERY WILL BE TAKEN PURSUANT TO THE CHARTER PROVISIONS ON THE NEXT VOYAGE TERMINATION. ACTUAL REDELIVERY WILL NOT BE TAKEN OF SUCH VESSELS, AND INVENTORY AND SURVEY UNNECESSARY IF THE CHARTERER DESIRES TO CONTINUE SUCH VESSELS UNDER THE MARITIME COMMISSION FORM OF CHARTER ABOVE OUTLINED.

"TELEGRAPHIC OR WRITTEN ACCEPTANCE ADDRESSED TO SECRETARY, MARITIME COMMISSION, OF THE CONDITIONS OF THE MARITIME COMMISSION FORM OF CHARTER AS ABOVE OUTLINED MUST BE RECEIVED WITHIN FIVE DAYS FROM DATE.

"EXCEPTED FROM THE FOREGOING ARE COMMITMENTS OR CHARTERS WITH RESPECT TO ANIMAL CARRYING VESSELS WHICH WILL BE THE SUBJECT OF SPECIAL ARRANGEMENTS.

W.W. SMITH
CHAIRMAN
U. S. MARITIME COMMISSION
GRANVILLE CONWAY
ADMINISTRATOR
WAR SHIPPING ADMINISTRATION"

The proper officers of the Commission were authorized and directed to take any and all actions necessary and proper to carry the action of the Commission as above set forth fully into effect.

Volume II. Exhibit E-12

[Releases and Regulations of War Shipping Administration and Maritime Commission Relating to Bareboat Charters]

[Policy Statement of March 6, 1946 Governing Interim Chartering]

Horton — Maritime 60 PR-2594(W)

WAR SHIPPING ADMINISTRATION
Washington, D. C.

For Release after 3 P.M.
Wednesday, March 6, 1946

The following statement on interim chartering of U. S. Merchant ships was issued today by the War Shipping Administration:

POLICY GOVERNING INTERIM CHARTERING OF SHIPS BY WAR SHIPPING ADMINISTRATION

I. General statement of purpose and intention.

With the termination of the UMA agreement on March 2, 1946, the WSA proposes to derequisition vessels chartered to the WSA as rapidly as possible so as to achieve prompt resumption of private shipping by operators owning their own vessels. It is obvious that the tonnage requirement necessary for transportation of foreign commerce of the United States will far exceed the privately owned tonnage to be derequisitioned. The UNRRA requirements and national import programs will create an emergent demand for tonnage during at least the calendar year 1946 and well into 1947. During this period it is felt necessary to curtail WSA operation through agents to the greatest extent possible, in order that dual operation (government and private) with its attendant disadvantages may be avoided.

The Policy of the Ship Sales Bill is to encourage the ownership and operation of the Merchant fleet of the United States by citizens thereof and the retirement of the

Government from Ship operation through the sale or charter of war-built tonnage. The pending bill provides that no charters shall be made under the Act until sixty days after the publication by the Maritime Commission of the statutory sales prices. However, as the Report of the Joint Conferees states: "The bill would not affect the existing authority of the War Shipping Administration and the Maritime Commission to charter vessels to citizens of the United States, which may be necessary for limited periods to speed up the resumption of private steamship operation." It is proposed, therefore, that with the termination of UMA, WSA will undertake a program of interim bareboat chartering under the authority of P.L. 101, 77th Congress, authorizing the charter of vessels "necessary for transportation of foreign commerce of the United States or of commodities essential to the national defense, upon such terms and conditions, for such period or periods, and subject to such restrictions as the Commission (now WSA) may deem necessary or desirable for the protection of the public interest, and at such rate of hire as it may deem to be fair and reasonable." It is intended that this program shall remain in effect only for such period as may be required for the chartering provisions of the Ship Sales to become fully operative. The provisions of the interim charters therefore will be patterned generally after the provisions of the Ship Sales Bill.

Following the termination of the UMA agreement on March 2, 1946, the War Shipping Administration will undertake to assure that adequate U. S. flag tonnage is available to transport this nation's fair share of its foreign commerce. It will also contribute tonnage to a pool to be formed for the common task of relief and rehabilitation including the shipping requirements of UNRRA for cargo moving from the United States and Canada. These requirements will be centrally programmed in Washington and so far as possible cargo to move on United States

flag ships will be allocated to privately owned or chartered shipping. Any deficiencies resulting will be met by government owned tonnage.

The WSA does not expect to exercise any direct control over privately owned tonnage except to see that it is employed in a manner not inconsistent with the overall programs and the welfare of the American Merchant Marine in general. The cost of moving cargoes for relief and rehabilitation will however continue to be of direct concern to this Government and freight rates for such cargoes therefore must conform with Conference or WSA approved rates. At the same time WSA recognizes fully that participation by private capital is dependent upon adequate and compensatory rates.

The WSA hopes that a large share of this Government's obligation for the transportation of relief and rehabilitation cargoes will be met by privately owned or chartered tonnage.

II. Basic policy regarding chartering.

Charters will be made to:

(a) Operators of liner or berth services who will be expected to bring their fleets up to the standards required for peacetime operation pending acquisition of new tonnage and/or redelivery of their owned vessels.

(b) Liner or berth operators to provide additional tonnage necessitated as a result of the war or in the relief and rehabilitation program, to handle the additional cargo moving on berth vessels.

(c) Experienced operators other than those engaged in berth services for the transportation of commodities which move under contract and in full-cargo lots.

(d) Other operators who qualify and commit themselves to purchase ships under the Merchant Ship Sales Act of 1946.

(c) Operators for employment in cross trades (that is between foreign port) where such operation is in the interest of the over-all government program and does not conflict with a United States flag berth service.

III. Form of Charter.

A draft of proposed "WARSHIPDEMISEOUT" as an interim charter, the provisions of which are patterned generally after those of the Ship Sales Act, has already been released. Comment on the provisions of this charter is unnecessary for the purpose of this statement, except to state that the trading limits will be in conformity with the basic policy set out in paragraph "II" herein and that WSA must exercise reasonable control over the routing and cargo carried by the ships it charters.

The following table sets forth proposed basic charter rates for standard vessels based on the pending Ship Sales Bill.

Type Vessel	Deadweight Tonnage	Estimated Statutory Sales Price (Mean)	Charter Rate Per Annum 15% of Sales Price*	Charter Rate Per Month*
EC2-S-C1	10,800	$ 582,833.00 Ceiling	87,424.95	7,285.41
C1-M-AV1	5,100	640,000.00	96,000.00	8,000.00
C1-C1A	7,400	932,757.50	139,913.63	11,659.47
C1-C1B	9,100	932,757.50	139,913.63	11,659.47
C2-C2-S-B1	9,200	991,347.00	148,702.05	12,391.84
C2-C2-S-AJ1	10,800	991,347.00	148,702.05	12,391.84
C3	12,300	1,154,000.00	173,100.00	14,425.00
VC2-S-AP2	10,800	917,979.50	137,696.93	11,474.00
VC2-S-AP3	10,800	1,026,347.00	153,952.05	12,829.34

* With additional charter hire payable in accordance with the provisions of Sec. 709, Merchant Marine Act, 1936.

IV. General

In the allocation of cargo to be carried by U. S. flag vessels, first preference will be given by WSA to the owners and second preference to charterers of U. S. flag vessels.

Except in very unusual cases, no charters will be made under the authority of P.L. 101 (77th Congress) after the effective date for chartering under the Ship Sales Act. Furthermore, it is intended that these interim charters shall be supplanted by Ship Sales Act charters at the earliest practicable date.

In order to receive consideration, any comments with respect to the above must be received not later than March 15, 1946.

[Bareboat Charter Regulation No. 1—July 2, 1946]

Kendrick — Maritime 796 PR 2802 (W)

WAR SHIPPING ADMINISTRATION
Washington

FOR RELEASE

Tuesday, July 2, 1946

The War Shipping Administration today released the following:

BAREBOAT CHARTER REGULATION No. 1

Notice to All Bareboat Charterers of WSA Vessels and All Claimants Requesting Assistance of WSA Owned Tonnage for Transportation of Grain and Coal Cargoes from United States to European, North African, Indian and Asiatic Destinations.

To insure continuous uninterrupted flow of Relief and Rehabilitation cargoes from the United States to devastated areas for which the WSA is responsible,

complete coordination of the maximum use of port facilities and necessary control over vessel berthings for shipments of coal and grain cargoes to all European, North African, Indian and Asiatic destinations must be maintained by WSA. To guarantee such coordinated control it is essential that all U. S. Government-owned ships, including those under bareboat charter to private operators, be allocated for such cargoes by the WSA.

Accordingly, effective immediately, any WSA vessel under bareboat charter and available for coal or grain cargoes to European, North African, Indian and Asiatic destinations must be nominated and offered to the Division of Allocations for voyage allocation to meet cargo requirements and berthing requirements. Such nominations should be made through Mr. P. F. Tunison, WSA New York, for vessels on the Atlantic Coast; through Mr. W. E. McCardell, WSA New Orleans, for vessels in the Gulf; and through Mr. R. Pries, WSA San Francisco, for vessels on the Pacific Coast.

After allocation of vessel by the Division of Allocations, charter shall be arranged between bareboat charterer and the cargo shipper or claimant on the following basis:

1. Rate of freight to be not higher than the current WSA rate and to be not lower than 10% less than the current WSA rate.

2. WSA voyage charter terms and conditions to apply.

3. Total brokerage commission to be not more than that allowed under WSA General Order No. 45 on bulk cargoes of coal and grain, namely, a sum not to exceed an amount equal to 1¼% of a freight revenue calculated at $4.00 per ton on the total number of cargo tons, or five cents per ton. No other commissions shall be payable by vessel.

Signed

GRANVILLE CONWAY
Administrator

[Bareboat Charter Regulation No. 2—July 10, 1946]

WAR SHIPPING ADMINISTRATION
Washington

BAREBOAT CHARTER REGULATION No. 2

TO: All Bareboat Charters of War Shipping Administration Vessels.

The standard clause for description of trading limits in bareboat charters covering those approved under Clause II-C of Interim Charter Policy, has been amended as follows:

> "World wide trading (a) in foreign trade from and to U. S. ports carrying such bulk cargoes or cargoes of one commodity as may be approved by the owner moving under contract in full cargo lots, with privilege of carrying on deck cargo of one commodity of type different from that carried under deck as may be approved by the owner; and/or (b) on intermediate voyages between foreign ports (i) in berth service provided such service does not compete with an established U. S. flag general cargo berth service as determined by the owner or (ii) carrying in full cargo lots such cargoes as may be approved by the owner, provided that, except with the prior approval of the owner, neither a direct round cargo voyage between foreign ports nor more than two cargo voyages between foreign ports may be made after sailing from a U. S. port."

By an addendum to be issued as soon as practicable, the above mentioned clause will be incorporated in bareboat charters already approved and executed.

Effective with voyages commencing on and after July 1, the carriage of cargoes on all vessels bareboat chartered from the War Shipping Administration are subject to the following provisions:

It is required that one copy of voyage charters, or other contracts of affreightment, executed covering the carriage of all bulk or full cargoes shall be submitted to the Director of Traffic.

With the exception of the rate levels established for coal and grain cargoes set forth in Bareboat Charter Regulation No. 1, all other cargoes are to be carried at the established Conference rates or at the War Shipping Administration approved rates.

Total brokerage commission to be not more than that allowed under General Order No. 45 and all supplements thereto, *on all cargoes*. No other commissions shall be payable by the vessel.

Bareboat charterers who redeliver vessels to the War Shipping Administration shall not be eligible for the charter of additional War Shipping Administration vessels for a period of sixty (60) days, with the exception that particular type vessels for operation in a regular berth service may be substituted for the vessel being redelivered.

We also wish to bring to your attention that the subtime charter of vessels bareboat chartered from the War Shipping Administration will be approved only under extenuating circumstances and at current time charter rates for American vessels as determined by the Director of Traffic. Attention of the Bareboat Charterers is also called to the provisions of Clause 22, Part II. In any case where the provisions of this Clause are applicable the Bareboat Charterers shall submit to the Director, Operating Contracts Division, full particulars thereof, including a certified copy of the time charter or other contract or agreement for approval of the terms thereof.

(Sgd.) GRANVILLE CONWAY
Granville Conway
Administrator

July 10, 1946

[Bareboat Charter Regulation No. 3—July 31, 1946]

WAR SHIPPING ADMINISTRATION
Washington

July 31, 1946

BAREBOAT CHARTER REGULATION No. 3

PERTAINING TO ALL WAR SHIPPING ADMINISTRATION VESSELS UNDER BAREBOAT CHARTER

A. Bareboat Charter Regulation No. 1 dated July 1, 1946 is hereby cancelled effective August 1; 1946.

B. However, on all bareboat chartered vessels fixed or which may be fixed to berth after July 31 to load grain or coal cargoes moving from the United States to European, North African, Indian and Asiatic destinations, WSA voyage charter terms and conditions shall continue to apply.

C. Bareboat Charter Regulation No. 2 dated July 10, 1946 is hereby amended to read as follows:

1. The standard clause for description of trading limits in bareboat charters covering those approved under Clause II-C of Interim Charter Policy, has been amended as follows:

"World wide trading (a) in foreign trade from and to U. S. ports carrying such bulk cargoes or cargoes of one commodity as may be approved by the owner moving under contract in full cargo lots, with privilege of carrying on deck cargo of one commodity of type different from that carried under deck as may be approved by the owner; and/or (b) on intermediate voyages between foreign ports (i) in berth service provided such service does not compete with an established U. S. flag general cargo berth service as determined by the owner of (ii) carrying in full cargo lots such cargoes as may be approved by the owner, provided that, except with the prior approval of the owner, neither a

direct round cargo voyage between foreign ports nor more than two cargo voyages between foreign ports may be made after sailing for a U. S. port."

2. By an addendum to be issued as soon as practicable, the foregoing clause will be incorporated in bareboat charters already approved and executed.

3. Effective with voyages commencing on and after July 1, the carriage of cargoes on all vessels bareboat chartered from the War Shipping Administration are subject to the following provisions:

(a) It is required that one certified copy of voyage charter, or other contracts of affreight, executed covering the carriage of all bulk or full cargoes shall be submitted to the Director of Traffic.

(b) With the exception of rate levels established for coal and grain cargoes under Bareboat Charter Regulation No. 1, which apply to July only, all cargoes are to be carried at the established conference rates or at rates approved by WSA, except full cargoes of grain (bulk or bagged), nitrates (bulk or bagged), sugar between foreign ports, coal, coke, sulphur, bauxite, phosphate rock and other full bulk cargoes not hand stowed and approved by the owners under Section G-1 of this Regulation.

4. Effective with all voyages contracted for and commencing between July 15 and July 31, 1946 both inclusive, total brokerage commission to be not more than that allowed under General Order No. 45 and all supplements thereto, on all cargoes. No other commissions shall be payable by the vessel.

5. Effective with all voyages contracted for berthing after July 31, 1946, the following brokerage commissions shall be allowed as expense under final accounting of voyage profits under terms of the bareboat charter:

(a) On all cargoes loaded for account of UNRRA total brokerage commissions shall be not more than 1¼% of the gross freight. Forwarding fees payable to freight forwarders, if any, shall be paid from such brokerage commissions. No other commissions shall be payable by the vessel.

(b) Total brokerage commissions on relief and rehabilitation cargoes, other than for account of UNRRA, moving on Government owned bareboat chartered vessels to devastated war areas shall not exceed reasonable rates that would normally be charged for the brokerage service rendered in respect to such cargoes; and no commissions other than brokerage commissions shall be payable by the vessel. If it is found that total brokerage commissions in any respect exceed reasonable rates, the War Shipping Administration will reserve the right to regulate and limit such brokerage commissions on Government owned bareboat chartered vessels.

6. Bareboat charterers who redeliver vessels to the War Shipping Administration shall not be eligible for the charter of additional War Shipping Administration vessels for a period of sixty (60) days after date of redelivery, except that more suitable type vessels owned or chartered by the charterer for operation in a regular berth service may be substituted for bareboat vessels being redelivered without affecting such eligibility.

7. Sub-time chartering of vessels bareboat chartered from the War Shipping Administration will be approved only under extenuating circumstances and at current market time charter rates for American vessels as determined by the Director of Traffic. Attention of the Bareboat Charterers is also called to the provisions of Clause 22, Part II. In any case where the provisions of this Clause are applicable the Bare-

boat Charterers shall submit to the Director, Operating Contracts Division, full particulars thereof, including a certified copy of the time charter or other contract or agreement for approval of the terms thereof.

(Sgd.) GRANVILLE CONWAY
Granvielle Conway [sic]
Administrator

[Traffic Regulation Prescribing Rates, etc., Applicable to Maritime Commission Controlled Vessels]

UNITED STATES MARITIME COMMISSION
WASHINGTON

January 24, 1947

TRAFFIC REGULATION No. 17
(War Shipping Administration Function Series)

PERTAINING TO
VESSELS OWNED BY OR UNDER CHARTER TO WAR SHIPPING ADMINISTRATION AND UNITED STATES MARITIME COMMISSION
(Dry Cargo Vessels, Troopships and Refrigerator Vessels)

To: All Agents, General Agents and Berth Agents

SUBJECT: Prescribing Per Diem Rates and Terms and Conditions Applicable to War Shipping Administration and United States Maritime Commission Controlled Vessels Made Available to War and Navy Departments on "Use of Vessel" Basis on and after July 1, 1946.

Pursuant to agreement with the War Department and Navy Department, the following per diem rates and attendant terms and conditions are hereby prescribed as applicable to War Shipping Administration and United States Maritime Commission controlled vessels made available to the War Department and Navy Department on a per diem "use of vessel" basis on which loading was or is commenced on and after July 1, 1946. The rates prescribed apply to both port and sea time.

Section I. Per Diem Rates

Dry Cargo Vessels	*Rates*	*Troopships*	*Rates*
EC2-S-C1 (Liberty)	$1,400	EC2-S-C1 (Liberty)	$1,545
VC2-S-AP2 (Victory)	1,845	VC2-S-AP2 (Victory)	2,190
VC2-S-AP3 (Victory)	1,980	VC2-S-AP3 (Victory)	2,265
C1-M-AV1	1,130	C1-A	1,835
C1-A (Turbine)	1,490	C1-B	1,880
C1-A (Diesel)	1,465	C2	2,055
C1-B (Turbine)	1,460	C3-S-A2	2,385
C1-B (Diesel)	1,495	C4-S-A3	
C2-S-AJ1	1,690	C4-S-B2	2,965
C2-S-B1	1,675		
C3-S-A2	1,965	*Refrigerator Vessel*	
C4-S4	2,235		
N3-S-A2	1,045	R2-S-B1	1,955

Section II. Items Included in Per Diem Rates

(1) Crew subsistence and wages, including overtime, area bonuses and Social Security taxes.

(2) Fuel, except as provided in Section III, paragraph 4, and water.

(3) Stores, supplies and equipment (not including purchase or rental of special equipment or facilities necessitated by unusual nature of the cargo to be handled.)

(4) Repairs and maintenance.

(5) Miscellaneous Vessel expense.

(6) Marine and War Risks Hull and Machinery and P. & I. Insurance.

(7) Port expenses, such as towage, pilotage, entrance and clearance dues and fees, handling lines, consular and customhouse dues and charges, health and sanitary fees, stamp and document charges; also wharfage, dockage, mooring and unmooring fees, anchorage dues, lighthouse dues, tonnage dues and taxes, harbor dues, port taxes, and similar charges, however called, normally borne by the vessel. The sum included in the per diem rates to cover these port expenses is contin-

gent upon Maritime Commission vessels continuing to receive without charge at Army or Navy shore installations the same services that were furnished free prior to July 1, 1946.

(8) Compensation paid to Agents of War Shipping Administration or United States Maritime Commission for husbanding the vessel and for acting as accounting line, including the supervision and handling of per diem accounts.

Section III. Items Not Included in Per Diem Rates

(1) Subsistence of troops or others carried for account of the War or Navy Departments. (*Note:* Separate instructions as to rates of subsistence will be issued.)

(2) Cargo and passenger taxes, dues and fees of every nature whether assessed directly against the cargo or passengers or against the vessel in relation to or based on the cargo or passengers transported, other than those covered by paragraph 7 of Section II, i.e., such items as are normally assessed against cargo or passengers.

(3) "Attack bonus" payable to crew.

(4) Adjustments in fuel costs for Troopships to compensate for effect of any increase resulting from fuel purchased outside the United States.

(5) Stevedoring, accessorial and other charges connected with the receiving, loading, trimming, discharge and delivery of cargo or the embarkation or debarkation of troops and passengers, including the cost of lighters, barges, heavy lift or other special equipment, dunnage or fittings required for cargo purposes and costs of cleaning holds and tanks after discharge of cargo.

(6) Canal Tolls and dues, transit charges, etc.

(7) Agency fees and commissions for services required in domestic or foreign ports in connection with the handling of cargo and troops and passengers.

Section IV. General Terms and Conditions—Dry Cargo and Refrigerator Vessels

(1) In general, any cargo vessel allocated to Army or Navy service will be considered as operating therein from noon of the date when the vessel is tendered or made available for such service, whether or not at the stipulated port of loading and continuing until noon of the date the vessel is tendered back to the U. S. Maritime Commission free of cargo and/or ballast at a United States port except as may otherwise be mutually agreed in specific cases. In short, the period of service which normally will be considered as being properly chargeable to Army or Navy will be for a full round voyage. However, if other suitable employment can be found for a vessel by the owner in the general area in which Army or Navy cargo is discharged, the voyage period for which billing will be rendered will be adjusted accordingly. The Departments will be billed at the applicable per diem rate for the full period of time during which the vessel operated in their service except as otherwise provided herein.

(2) If, after assignment to Army or Navy service, a vessel is *wholly* prevented from prosecuting her voyage as a result of a breakdown in her machinery or equipment requiring extensive or major repairs, or by dry docking, or by other causes for which the Commission is responsible, an appropriate adjustment in the per diem billing will be made, provided however, that any such adjustment will not be considered for any disability which covers a period less than one full day of 24 hours.

(3) In the event a part commercial or other non-military cargo is carried with the approval of the owner during any voyage for which charges on a per diem basis are to be billed, the vessel involved will be granted an appropriate credit therefor to the extent of the net revenue received for the transportation of such cargo. However, in no instance shall the credit exceed the per diem hire accruing for the leg of the voyage involved. "Net Revenue", as here used, means the amount remaining after deduction of any expense borne by the Commission in handling such cargo, that is, loading, trimming and discharging costs, accessorial and other charges, brokerage, agency fees, commissions, etc.

Section V. General Terms and Conditions—Troopships

(1) In general, any troopship allocated to military service will be considered as operating therein from noon of the date the vessel is tendered or made available for such service whether or not at the stipulated port of embarkation and continuing until noon of the date the vessel is tendered back to the U. S. Maritime Commission free of troops, impedimenta, cargo and/or ballast at a United States port except as may otherwise be mutually agreed in specific cases.

(2) The provisions as set forth in Section IV, paragraph 2, respecting disabilities of dry cargo and refrigerator vessels, including appropriate adjustments in per diem billings, shall also apply with regard to troopships.

(3) Commercial fare-paying passengers will not be transported on troopships when allocated to military service.

* * * * *

Instructions respecting billing and collecting from the War and Navy Departments will be issued by the Finance Department.

(Sgd.) F. M. DARR
F. M. Darr
Director of Traffic

January 24, 1947

[Circular Letter to Bareboat Charterers Concerning Approval of Subcharter Rates, etc.]

UNITED STATES MARITIME COMMISSION

Washington

Operations Department

CIRCULAR LETTER

To All Bareboat Charterers

Gentlemen:

It has been brought to our attention that in some instances operators of bareboat chartered vessels with world-wide trading privileges have not been complying with the provisions of their bareboat charters with the U. S. Maritime Commission. We bring to your attention the world-wide trading limits clause which reads as follows:

"World-Wide trading (a) in the foreign and/or domestic trade of the United States carrying such bulk cargoes or cargoes of one commodity *as may be approved by the owner* moving under contract in full cargo lots, with privilege of carrying on deck, cargo of one commodity of type different from that carried under deck *as may be approved by the owner;* and/or (b) on intermediate voyages between foreign ports (i) in berth service provided such service does not compete with an established U. S. flag general cargo berth service *as determined by the owner* or (ii) carrying in full cargo lots such cargoes *as may be approved by the owner.*"

In order that there be no further misunderstandings we bring to your attention a few of the requirements which

must be adhered to in order to avoid violation of your bareboat charter.

(1) *All* proposed voyages must be submitted to this office for approval *prior* to the actual fixing of the vessel. This may be done by telephone or telegram, setting forth rates, terms and conditions of the proposed venture. (It is suggested that your offers for fixtures be made subject to the approval of the Maritime Commission.)

(2) After a proposed voyage with its attendant rates, terms and conditions has been approved, a certified copy of all charters, booking agreements, or contracts of affreightment shall be submitted to this office. (If this has not been done, copies of all charters, etc., should be submitted to this office immediately.)

(3) Voyages involving cargoes moving for the account of the Army and/or Navy will *not* be approved for more than one port of loading and one port of discharge except in isolated cases, and are subject to the provisions of Paragraph (1) of this letter.

(4) Voyages provided for employment of vessels for operation on the berth of a foreign flag operator will *not* be approved under any circumstances.

(5) Voyages of vessels fixed for the carriage of grain are *not* to be fixed on charter forms granting the option of loading flour.

Bareboat charterers who fail to comply with the foregoing requirements and the provisions set forth in W.S.A. Bareboat Regulation No. 3 may violate the provisions of their fleet charter and incur the penalties set forth therein. Kindly be guided accordingly.

Yours very truly,

(Sgd.) F. M. Darr
F. M. Darr
Director of Traffic

February 10, 1947

Volume II Exhibit E-11

[Copies of Telegrams Showing Approval by Maritime Commission of Subcharter Rates, etc.]

COPY

WESTERN UNION
TELEGRAM

[January 28, 1947]

WUAE8 DL PD GOVT - BOSTON MASS JAN28 526P

REOURTEL 24th ALLOCATING WILLIAM H KENDRICK AND WILLIAM MCKINLEY YOUR ACCOUNT UNDER MARITIME BAREBOAT CHARTER. THIS IS TO ADVISE CHARTER PARTY WILL RESTRICT VESSEL'S USE TO DOMESTIC COAL TRADE AT LAST POSTED OPA RATES AND THESE VESSELS WILL BE CONSIDERED A SEPARATE FLEET FOR RECAPTURE PURPOSES. THESE CHARTERS GRANTED ON CONDITION THAT YOUR OWNED VESSELS PRESENTLY OPERATING IN DOMESTIC COAL TRADE WILL BE RETAINED THEREIN DURING PERIOD OF CHARTER. THE MERRIMAC SEAM PRESENTLY UNDER MARITIME BAREBOAT CHARTER YOUR COMPANY IS TO BE TRANSFERRED TO THE DOMESTIC COAL TRADE FLEET CHARTER IN ACCORDANCE WITH THE ABOVE UPON HERE NEXT ARRIVAL AT NEWPORT NEWS. REQUIRE YOUR PROMPT ACKNOWLEDGEMENT AND ACCEPTANCE OF THE ABOVE CONDITIONS. ADVISE DATE AND HOUR MERRIMAC SEAM TRANSFERRED TO DOMESTIC COAL TRADE FLEET CHARTER.

J FRIEDLANDER JR. U.S. MAR COMM 502 WASH D.C.

COPY

WESTERN UNION
TELEGRAM

March 25 1947

Mr. E. A. Terrio,
Asst. Director of Traffic
U.S.MARITIME COMM
Wash. D.C.

Have closed SS GEORGE VANCOUVER load cargo. coal April fifth to fifteenth for Genoa. Rate thirteen dollars ninety five cents. Please approve charter.

R.C.Goodwin, V.P.
Mystic Steamship Div. EG&F

Chge Sign.
5:00 pm

COPY

WESTERN UNION
TELEGRAM

TWVAGOVT - WUX WASHINGTON DC MAR 26 349P
R C GOODWIN, VICE PRESIDENT MYSTIC STEAMSHIP
DIVISION EASTERN
GAS & FUEL ASSOCIATES

RETEL GEORGE VANCOUVER COAL FOR GENOA WE APPROVE.

E A TERRES USMARITIME COMM WASHN DC.414P.

RWUAG 166 VG

COPY

WESTERN UNION
TELEGRAM

April 8, 1947

Mr. E. A. Terres,
Assistant Director of Traffic
U.S. Maritime Comm
Wash. D.C.

HAVE CHARTERED SS GEORGE VANCOUVER TO FRENCH LOAD COAL NORTH ATLANTIC PORTS ABOUT APRIL 28th AT SIXTY CENTS OVER. SHOULD VESSEL NOT REPORT UNTIL MAY RATE TO BE FIFTY CENTS OVER. PLEASE APPROVE.

R.C.Goodwin,V.P.
Mystic Steamship Div.
E.G.&F.ASSOC

Cage Sign
8 pm

COPY

WESTERN UNION
TELEGRAM

AWU BAG 23 GOVT NL PD-WUX WASHINGTON DC. APR 9
R C GOODWIN MYSTIC STEAMSHIP CO.
EASTERN GAS & FUEL ASSOCIATES

APPROVE VOYAGE GEORGE VANCOUVER LOAD COAL NORTH HATTERAS TO [FRENCH]

E A TERRES U S MAR COMM. 845

COPY

WESTERN UNION
TELEGRAM

April 25, 1947

Mr. E. A. Terres
Assistant Director of Traffic
U. S. Maritime Commission
Washington, D.C.

Have chartered SS JAMES BOWDOIN to French on coal loading about June 1st. Also SS EMILY DICKINSON to French on coal loading about May 25th. Please approve.

R.C.Goodwin,V.P.
Mystic SS DIV.
E.G.&F.ASSOC.

Chge Sign.
T.D.11:25 am

COPY

WESTERN UNION
TELEGRAM

April 28, 1947

Mr. E. A. Terres
Assistant Director of Traffic
U. S. Maritime Commission
Washington, D. C.

Retel JAMES BOWDOIN and EMILY DICKINSON both chartered at full W.S.A. old rates and the usual French options loading Philadelphia, Hampton Roads or Baltimore American Welsh Form. Freight payable New York without discount on bill of lading quantity. Total of all commissions two and half percent. fortyeight hour free time at loading port reduced twentyfour hours unless vessel sooner berthed. Twentyfour hours free time at discharging berth.

(END FIRST PAGE)

COPY

WESTERN UNION
TELEGRAM

(CONT.)

April 28, 1947

No despatch figured on these times. The five W.S.A. clauses added and charter tied in to present bare boat charter.

R.C.Goodwin, V.P.
Mystic S.S. Div.
E.G.&F.Assoc.

Chge M.S.S. Div.
T.D. 5:20 pm

COPY

WESTERN UNION
TELEGRAM

[April 29, 1947]

XWA593 GOVT DL PD-WUX WASHINGTON DC 29 440P
R.C.GOODWIN PRES
MYSTIC SS DIV. BSN

RETEL JAMES BOWDOIN EMILY DICKINSON WILLIAM MCKINLEY AND WILLIAM BEVAN APPROVE ALL VOYAGES—

E A TERRES U.S. MARITIME COMMISSION

COPY

WESTERN UNION
TELEGRAM

May 15 1947

Mr. E. A. Terres
Asst. Director of Traffic
U. S. Maritime Commission
Washington, D. C.

Have chartered SS EMILY DICKINSON to British load sugar for England about July 5th SanDomingo $16.00 Cuba $17.50. Usual London form including five Maritime Commission clauses. Please approve.

R.C.Goodwin, V.P.
Mystic SS DIV.
E.G.&F.Assoc.

Chge M.S.S. Div.
T.D. 4:35 pm

COPY

WESTERN UNION
TELEGRAM

WUAE 1 12 P-WASHDC May 16 128P

MYSTIC STEAMSHIP CO-BSN MASS

APPROVE EMILIE DICKINSON SUGAR CARGO $16.00 SAN DOMINGO AND $17.50 CUBA ANKUKAY

E A TERRES US MAR COMM WASH FC CFM $16.00 $17.50.

(51) PLS PO RWUAF RWUAEV 112 VG

COPY

WESTERN UNION
TELEGRAM

July 9, 1947

E. A. Terres,
Assistant Director of Traffic
U. S. Maritime Commission
Washington, D. C.

Have chartered SS GEORGE VANCOUVER one trip to French at $1.75 under American Welch form loading August 10th. Please approve.
Also chartered EMILY DICKINSON load coal for French August 25th at $10.40.
Chartered three voyages SS WILLIAM BEVAN to Dutch load coal at $9.15 one voyage. Please approve.

R. C. Goodwin, V.P.
Mystic Steamship Div.
E.G.&F.Assoc.

Chge. Sign.
4.16 pm

COPY

WESTERN UNION
TELEGRAM

WASHINGTON DC JULY 11 1947

R.C. GOODWIN, VICE PRES
MYSTIC STEAMSHIP DIV

APPROVE FIXTURES SS GEORGE VANCOUVER SS EMILY DICKINSON SS WILLIAM BEVAN

E A TERRES ASSISTANT DIRECTOR OF TRAFFIC

WESTERN UNION
TELEGRAM

WUAB 14 GOVT DL PD=WUX WASHINGTON DC AUG 15 428P

EASTERN GAS & FUEL ASSOCIATES (MYSTIC SS DIVISION)=

EFFECTIVE IMMEDIATELY WITH RESPECT TO ALL USMC BARE BOAT CHARTERED VESSELS WITH THE EXCEPTION OF CONTRACTS ALREADY ENTERED INTO FOR CONSECUTIVE VOYAGES THE US MARITIME COMMISSION WILL APPROVE ONLY COAL AND GRAIN FIXTURES FROM U S PORTS MADE ON WARSHIPVOY (REVISED) 8/15/44 FORM OF CHARTERPARTY WITH APPLICABLE TERMS AND

CONDITIONS AS SET FORTH IN THE WSA RATE ORDERS PLEASE BE GUIDED ACCORDINGLY=

G H HELMBOLD U S MAR COMM. 8/15/44 WSA. 759A

COPY

WESTERN UNION
TELEGRAM

August 25, 1947

Mr. E. A. Terres
Assistant Director of Traffic
U.S. Maritime Comm.
Wash. D. C.

We have chartered SS WILLIAM MCKINLEY AND SS GEORGE VANCOUVER to Italians for loading approximately Sept 3 and Sept 23 respectively coal for Italy at $9.95 per gross ton Warship Form Charter. We now request your approval these charters.

R.C.GOODWIN, V.P.
Mystic Steamship Div.
E.F.&F. ASSOC.

Chg.Sign
4:00 pm

COPY
WESTERN UNION
TELEGRAM

WUAG45 19/18 DL COLLECT - WUX WASHINGTON DC SEPT 9 1032A

R C GOODWIN, V.P. MYSTIC SS CO

CONFIRM TELEPHONE CONVERSATION APPROVE WILLIAM MCKINLEY AND GEORGE VANCOUVER COAL ACCOUNT ITALIANS AT $9.95 WARSHIPVOY FORM CHARTER

E A TERRES US MARITIME COMMISSION

Volume II Exhibit E-4

[War Department Time Charter Clause Providing for Increase in Rate if Bareboat Basic Charter Rate were Increased]

[Typical clause (Article 13C) from Contract No. W-45-045 tc-758, dated January 24, 1947 between War Department and Eastern Gas and Fuel Associates for time charter of SS ANDREW STEVENSON.]

C. Price Adjustment for Changes in United States Maritime Commission Charter Hire Rates. If the vessel is bareboat chartered from the United States Maritime Commission, the per diem rates of compensation set out in Article 2 hereof are based upon the Owner paying to the United States Maritime Commission a basic charter hire (without regard to the additional charter hire payable pursuant to the Merchant Ship Sales Act of 1946) computed on the basis of fifteen per cent per annum of the estimated statutory sales price for any vessels chartered from the Maritime Commission. In the event that such basic charter hire is greater or less than fifteen per cent per annum of the estimated statutory sales price for any such vessel, the rate of compensation specified in Article 2 hereof will be adjusted in the amount that such basic charter hire is greater or less than fifteen per cent per annum on the estimated statutory sales price.

Volume II Exhibit E-15

[Instructions, Regulations, Etc., Indicating That Payments of Additional Charter Hire Were Tentative, Conditional, and Subject to Reservation of Rights Under the Charters or Otherwise]

In addition to the two sections from the charter and the regulations quoted in Point III-E, pages 39-40, of the reply brief, there was a further regulation (46 C.F.R. 299.31(k)) providing that the charterer was entitled to apply for refund upon a public voucher containing the following statement:

> Payment by the U. S. Maritime Commission of all or any part of the amounts claimed herein will not be construed as an approval of the correctness of the amounts stated to be due the claimant nor as a waiver of any of the rights or remedies of either party under the terms of the said agreement or otherwise.

Preliminary instructions were also issued to the charterers by the Commission in November 1946, which stated in part:

> For the guidance of charterers in the preparation of the aforementioned statements, the following preliminary and tentative instructions are issued, upon the express understanding that neither their issuance by the Commission nor their observance by the charterer shall prejudice the rights of either under the applicable Charter Agreement, or otherwise, and that the Commission reserves the right to prescribe other bases for the determination of additional charter hire at the time of the annual or final accounting under the respective agreements.

On May 14, 1951, Martime issued the following instruction to charterers:

> Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon

through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is *on account* of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Martime Administration and that *neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof; nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise.* ("on account" emphasized by Maritime)

Volume II Exhibit E-15

[Correspondence Between Charterers and Maritime Commission Concerning Reservations of Rights]

BLIDBERG ROTHCHILD CO. INC.
SHIP OPERATORS AND AGENTS
80 BROAD STREET
NEW YORK 4, N. Y.

By Hand

Your Ref: OM35/L25-6-2:43002 (BAM)

April 28, 1954

Mr. J. G. Barkan, District Comptroller,
Maritime Administration,
U. S. Department of Commerce,
45 Broadway,
New York 6, New York.

Subject: Accounting Under Bareboat Charter Agreement SHIPSALESDEMISE 303 Contract MCc-41814 and the Foreign Trade Addendum thereto, for the period January 1, 1947 to November 30, 1949

Supplementary Accounting Under Bareboat Charter Agreements WARSHIPDEMISEOUT 203 Contract WSA-13104 and SHIPSALESDEMISE 303 Contract MCc-41814 for the Period July 1, 1946 to December 31, 1946

Dear Sir:

Reference is made to your letter of April 16, 1954, received April 19, 1954, concerning the above accountings. This letter is to advise you that we do not concur in the unilateral adjustments which your auditors have made in our accountings nor do we accept the accountings as adjusted further. We are returning herewith the duplicate copy of your letter unsigned so that there may no misunderstanding as to our position.

We repeat and reiterate our prior protest with respect to the accounting theories and rulings heretofore followed by your auditors, and particular protest is made with respect to the following points:

1. The requirement that additional charter hire be paid in excess of the amounts permitted under the law, i.e., all amounts in excess of 50 percent of the profits after an allowance for 10 percent of capital necessarily employed.

2. The refusal to permit cumulative accounting for the entire period of operation under the bareboat charters.

3. The requirement that separate accountings be made of additional charter hire for the period before and after September 1, 1947.

4. The failure to make reimbursement to Blidberg Rothchild Co. Inc., for various repairs, including those caused by latent defects which are for the account of the Maritime Administration.

5. The formula used in the definitions with respect to computing capital necessarily employed and net voyage profit.

6. The arbitrary limitations of allowable post-redelivery overhead.

7. The disallowance from income from other operations of the profit portion of fees earned from managing ships owned by others.

It is our contention that the position taken by the Martime Administration with respect to each of the above items and other problems not here listed is erroneous either under the bareboat charter contract or the applicable provisions of the Merchant Ship Sales Act, 1946, and the Merchant Marine Act, 1936. For that reason, we cannot accept your determinations with respect to these disputes nor the adjustments mentioned in your letter of April 16, 1954.

We will submit very shortly an accounting statement prepared in accordance with the proper and correct methods of accounting under the law and the contract and a request for reimbursement of overpayments heretofore required by the Maritime Administration.

Very truly yours,

BLIDBERG ROTHCHILD CO. INC.

By: (Signed) SYLVESTER E. ROTHCHILD
President.

SER:UA
Encl.

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
WASHINGTON 25, D. C.

Address reply to
Maritime Administration
and refer to File No.
QM35/L10-5-2:453

December 30, 1954

Blidberg Rothchild Company, Inc.,
80 Broad Street,
New York 4, New York.

Gentlemen:

Subject: Invoice 207-284—$103,652.90 (Balance)
Dated January 24, 1952
Invoice 411-142—$90,815.86
Dated May 17, 1954

Reference is made to our letter of December 15 and your reply of December 28, 1954, relative to the payment of the subject invoices for additional charter hire due in accordance with provisions of Clause 13 of the Charter Contracts.

This office is aware of the questions raised by you with regard to the accountings on which the subject invoices are based; however, the provisions of the charter agreement are binding upon your Company to pay such amounts as were billed to you with the understanding that refunds will be made of any amounts determined through supplementary accountings, to have been overpaid.

Accordingly, it is suggested that you remit the amounts presently established as being due the United States for additional charter hire and promptly take the necessary action to finally resolve with our District Comptroller, the questions relating to the accountings previously approved by him. Your rights to recover any amounts which may

be determined by such subsequent action to have been overpaid, are reserved to you in the charter agreement.

Prompt action by your company will avert the placing of a government-wide set-off payment order as contemplated in our letter of December 15, 1954.

Very truly yours,

/Sgd./ A. R. BOONE
Acting Comptroller

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
WASHINGTON 25, D. C.

Address reply to
Maritime Administration
and refer to File No.
QM92/L10-5-2:453

July 15, 1955

James Griffiths & Sons, Inc.
914 Second Avenue
Seattle 4, Washington

Attention: Mr. J. D. McMasters,
Secretary

Gentlemen:

Subject: Invoice 108-171—$6,169.29 (Balance)
Dated February 9, 1951

Reference is made to the subject invoice, to our letter of May 19, 1955, and to your reply of July 7, 1955, concerning additional charter hire due the United States pursuant to the provisions of Clause 13, Part II of WARSHIPDEMISEOUT 203 Contract WSA-13203 and SHIPSALESDEMISE 303 Contract MCc-41865, which provisions were quoted in our letter of May 19, 1955.

In your letter of July 7, 1955, you state that you had taken exception to the adjustment of the Administration's Auditor with respect to W. S. A. liquidation fees; you further state that you understand that other steamship companies have taken the same position in this matter and, you have been advised that a similar case is being or will shortly be argued in the Courts, therefore, you are unable to comply with our request for an early settlement of this invoice.

From the provisions of Clause 13 quoted in our letter of May 19, 1955, it is evident that situations such as you point out in your letter were anticipated at the time of entering into the contracts, and in view thereof, provisions were placed in the contracts which would require the charterer to pay additional charter hire to the government on a preliminary basis with a further provision for refunding to the charterer of any overpayments resulting from subsequent adjustments.

In regard to the last paragraph of your letter, this office would not consider it proper to defer collection action because of pending litigation, especially since such litigation is not in connection with this specific case, but would prefer to handle this matter in accordance with Clause 13 of the service agreements.

Therefore, this office would appreciate your remittance to cover the subject invoice with the understanding that if any subsequent action results in credits due your company, the amount of such credits will be promptly refunded.

Very truly yours,

WESLEY C. CLARK
Wesley C. Clark
Chief, Division of Credits and Collections

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
WASHINGTON 25, D. C.

Address reply to
Maritime Administration
and refer to File No.
QM147/L10-5-2:453

Mar 8, 1955

North Atlantic and
Gulf Steamship Company Incorporated
120 Wall Street
New York 5, N. Y.

Gentlemen:

Subject: Invoice 207-228—1/14/52—$4,650.00 (Balance)
Invoice 506-242—12/17/54—$125,778.84

Reference is made to our letter of February 9 and your reply of February 24, 1955, relative to the payment of the subject invoices for additional Charter Hire due in accordance with the provisions of Clause 13, Part II, of the Charter Contracts.

In your letter of February 24 you state as follows:

"We agree that the provisions regarding the preliminary payments of Charter Hire are quite clear, however, we feel that this question involves payment of additional Charter Hire as determined on the basis of final audit. The amount of additional Charter Hire indicated on your invoice is the amount shown on the audit report prepared by your local district auditor, however, if you will review your files you will find that this audit report was accepted only on the basis that it was to be amended by supplemental accountings."

Once again we would like to call your attention to the last part of Clause 13 of the Agreements which states as follows:

" * * * that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which time such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

Under the terms of the Agreements quoted in part, above, your company is indebted to the United States for additional Charter Hire at this time.

In reference to the last paragraph of your letter calling our attention to the fact that your Company has a suit pending against the United States Government; we fail to see how this pending suit has any bearing whatsoever on the payment of the subject invoices, for amounts due this Administration pursuant to the provision of the Charter Agreements, and binding upon your company to pay.

Accordingly, it is requested that you remit the amounts presently established as being due the United States for additional Charter Hire and promptly take the necessary action to finally resolve with our District Comptroller the questions relating to the accountings previously approved by him. Your rights to recover any amounts which may be determined by such subsequent action to have been overpaid, are reserved to you in the Charter Agreement.

Very truly yours,

WESLEY C. CLARK
Wesley C. Clark
Chief, Division of Credits and Collections

Volume II Exhibit E-18

[Letter Concerning Final Audit and Summary of Profits and Losses]

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
WASHINGTON 25, D. C.

Address reply to
Maritime Administration
and refer to File No.
QM67/L25-6-2:431

Nov 12 1954

Eastern Gas and Fuel Associates
(Mystic Steamship Division)
250 Stuart Street
Boston, Massachusetts

Gentlemen:

Subject: Supplementary Accountings Under General Order 60, Supplement 21, Covering Operations Under SHIPSALESDEMISE 302, Contract MCc-41881 and the Coastwise Coal Trade and Foreign Trade Addenda Thereto—For the Period November 1, 1946 to December 31, 1947

With respect to the subject supplementary accounting which was submitted with your public voucher dated December 7, 1953, there is attached copy No. 2 of the revised report prepared by the District Comptroller in New York and approved on November 10, 1954.

From Exhibit "AA"-1946-1947-Revised of the revised report it will be noted that Additional Charter Hire accrued to the Administration in the total amount of $528,306.68, which amount you are directed to pay to the Administration, less amounts heretofore paid on account thereof.

The attached revised accounting covers all items recorded through July 31, 1954, and represents a final determination of additional charter hire under the subject bareboat charter agreements. However, the accounting may be reopened for adjustment should any substantial error or omission later develop.

Your public voucher in the amount of $57.663.25 is returned herewith for cancellation.

Very truly yours,

B. W. HARVEY
B. W. Harvey
Chief, Division of Audits

Enclosures

[Schedule Attached to Letter of November 12, 1954]

[illegible]
MARITIME ADMINISTRATION

EASTERN GAS AND FUEL ASSOCIATES
(BOSTON STEAMSHIP DIVISION)

Page 1

EXHIBIT-"AA"-1946-1947-Revised

COMPUTATION OF ADDITIONAL CHARTER HIRE UNDER SHIPSALES/SEC.502
AND THE COASTWISE COAL TRADE AND FOREIGN TRADE ADDENDA THERETO FOR THE PERIOD FROM NOVEMBER 1, 1946 TO DECEMBER 31, 1947
BASED ON USE OF NET MONTH REQUIREMENTS AS "CAPITAL NECESSARILY EMPLOYED"

	Total	1946 SHIPS.LEND LEASE-605 Contract MAc-41881 DRY CARGO Coastwise Period 11/1/46	1946 SHIPS.LEND LEASE-605 Contract MAc-41881 DRY CARGO Offshore to 12/31/46	1947 SHIPSALES/SEC.502-605 CONTRACT MAc-41881 DRY CARGO Coastwise Period 1/1/47 to 7/31/47	1947 SHIPSALES/SEC.502-605 CONTRACT MAc-41881 DRY CARGO Offshore Period 1/1/47 to 10/31/47	1947 SHIPSALES/SEC.502-605 CONTRACT MAc-41881 FOREIGN TRADE ADDENDUM Period 1/1/47 to 12/31/47
Cumulative Net Voyage (Loss) and Allowable Return of 10% per annum as per Exhibit-"AA" of charterer's original accounting, approved May 6, 1948		$ (5,714.19)	$ (4,488.88)			$ (99,814.88)
Cumulative Net Voyage Profit in excess of 10% per annum of "Capital Necessarily Employed" as per Exhibit-"AA" of approved accounting dated May 6, 1948				$ 32,814.48	$ 646,978.88	
ADJUSTMENT ATTRIBUTABLE:						
Reverse Net Voyage Profit or (Loss) and Allowable Return of 10% per annum of "Capital Necessarily Employed"		5,714.19	4,488.88	(32,814.48)	(646,978.88)	99,814.88
Reinstate "Allowable Return" of 10% per annum on "Capital Necessarily Employed" as per Exhibit-"AA" of approved accounting, dated 5/6/48		881.44	1,811.92	3,480.88		6,488.88
Reinstate correct "Allowable Return" of 10% per annum on "Capital Necessarily Employed" as per Schedule-"A-1"-Revised, attached					21,778.81	
Reinstate adjusted Profit or (Loss) - Revised Exhibit-"C"		(5,684.78)	(4,888.48)	32,884.32	788,888.88	(848,488.48)
Deficiency Carry Forward from 1946				(5,196.18)	(5,888.47)	
Cumulative Net Voyage (Loss) and Allowable Return of 10% per annum on "Capital Necessarily Employed"		$ (5,196.18)	$ (5,888.47)			$ (848,888.48)
Cumulative Net Voyage Profit in excess of 10% per annum of "Capital Necessarily Employed"				$ 88,818.44	$ 718,787.78	
Additional Charter Hire:						
SHIPSALES/SEC.502-605 - Dry Cargo, Coastwise - (881 Terminated Days; 48 Terminated in 1946 and 888 in 1947):						
$88,818.44 @ 88% $11,888.78				$ 11,888.78		
SHIPSALES/SEC.502-605 - Dry Cargo, Offshore - (1782 Terminated Days):						
$178,888.88 @ 88% $88,188.88						
388,488.88 @ 78% $87,888.88						
178,187.78 @ 88% 188,888.88						
$718,787.78	$816,888.88					
					$ 816,888.88	
SHIPSALES/SEC.502-605 - Foreign Trade Addendum (818 Terminated Days)						$ None
Total Additional Charter Hire	$ 888,884.88			$ 11,888.78	$ 816,888.88	-0-

NOTE: Parentheses in money columns indicate red figures.

[From Maritime Administration Audit Report of August 20, 1954]

Volume II Exhibit R

[Letter Referring to Disputed Items in Final Accounting]

MYSTIC STEAMSHIP DIVISION
EASTERN GAS AND FUEL ASSOCIATES
GENERAL OFFICES 250 STUART STREET, BOSTON, 16, MASS.

February 15, 1955

Mr. B. W. Harvey
Chief, Division of Audits
Maritime Administration
Washington 25, D. C.

Re: Supplementary Accountings under General Order 60, Supplement 21, covering Operations under SHIPSALESDEMISE 303, Contract MCc-41881 and the Coastwise Coal Trade and Foreign Trade Addenda thereto—For the Period November 1, 1946 to December 31, 1947

Dear Sir:

This will refer to your letter of December 7, 1954, in the above matter, with which you returned our public voucher in the amount of $57,663.25 representing part of the charter hire heretofore overpaid to the Maritime Administration, and forwarded your invoice in the amount of $63,430.59 for recapture allegedly due the Administration. As we have previously indicated to you, there are a number of disputed matters involved in our charter accounting.

In the first place, the expenses arising out of the operations and redelivery of two of the vessels under charter to us, the SS EMILY DICKINSON and the SS JAMES BOWDOIN, should have been included in the accountings under Contract MCc-41881 for the period prior to September 1, 1947. Furthermore, protest has heretofore been made with respect to the requirement of the Maritime Adminis-

tration that recapture of earnings be paid in excess of that permitted by Section 709(a) of the Merchant Marine Act, 1936, which was incorporated in Section 5(e) of the Merchant Ship Sales Act of 1946 and made applicable to all charters entered into thereunder. The pertinent provisions of Section 709 limit recapture to one-half of excess earnings after an allowance of 10 percent of capital necessarily employed, whereas the Maritime Administration has claimed recapture in certain instances at the rates of 75 percent and 90 percent of such excess earnings.

Finally, there is the problem of the refusal of the Maritime Administration to permit the carryforward of profits from one accounting period to the next on a cumulative basis as is also provided in Section 709 of the Merchant Marine Act, 1936.

We attach hereto a summary reflecting our position as to the proper adjustments as outlined above. This summary indicates that the Maritime Administration has erroneously collected excess recapture in the amount of $220,358.72. For that reason, we must again not only respectfully decline to pay your invoice, but we also request payment in the amount of $220,358.72 covering the recapture erroneously collected.

Very truly yours,

MYSTIC STEAMSHIP DIVISION
EASTERN GAS AND FUEL ASSOCIATES

By C. R. WALTON
C. R. Walton, *Vice President*

CRW.mc
enclosures

[Schedule Attached to Letter of February 15, 1955]

MYSTIC STEAMSHIP DIVISION

EASTERN GAS AND FUEL ASSOCIATES

Calculation of Overpayment of Additional Charter Hire

U.S. Department of Commerce—Maritime Administration—Computation of net voyage profit—Ship Salesdemise 303 Dry Cargo-Offshore (Report August 20, 1954)		$712,707.72
Deduct inactive vessel expense of EMILY DICKINSON and JAMES BOWDOIN, which Maritime Administration excluded from period before September 1		110,326.89
Deduct loss 9/1/47 to 12/31/47 Foreign Trade Addendum—		
Maritime Administration	$246,892.44	
Less DICKINSON & BOWDOIN	110,326.89	136,565.55
		$246,892.44
Adjusted Net Voyage Profit		$465,815.28
Adjusted total additional charter hire at 50%		232,907.64
Additional hire previously paid	$464,876.09	
Deduct additional hire dry cargo-coastwise	11,609.73	453,266.36
Recapture erroneously collected		$220,358.72

Exhibit E-24

Vol. II Exhibit E-24

[Schedule Showing Vessels Under Bareboat Charter]

MYSTIC STEAMSHIP DIVISION
Eastern Gas and Fuel Associates
VESSELS UNDER BAREBOAT CHARTER FROM U.S.M.C.
1946 - 1947

Vessel	B.B.Charter #303 Contract No. MCc-41881	Date Executed by Chtr.	Date Of Delivery	Date Of Redelivery	Totals(A) Days Chtrd.	Totals(A) Chtr.Hire P'd. (Basic)	Terminated Voyage Days — Dry Cargo 11/1/46 - 12/31/46 CW	OB	Comb.	11/1/47 - 10/31/47 CW	OB	Comb.	F.T. Addendum 9/1/47 - 12/31/47 CW	OB	Comb.
S/S Emily Dickinson	Addendum #1	12/ 3/46	11/14/46	11/20/47	372	$ 97,713.75	-	-	-	-	372	372	-	-	-
" Merrimac Seam	Original	11/ 7/46	11/20/46	7/29/47	252	66,313.43	42	-	42	210	-	210	-	-	-
" William Bevan	Addendum #2	1/24/47	12/ 7/46	12/11/47	370	97,138.29	-	-	-	-	274	274	-	96	96
" Isaac Sharpless	Addendum #3	2/17/47	12/28/46	11/30/47	338	88,893.15	-	-	-	-	255	255	-	83	83
" Andrew Stevenson	Addendum #2	1/24/47	1/ 8/47	11/19/47	316(B)	82,997.00	-	-	-	-	257	257	-	59	59
" William McKinley	Addendum #5	5/28/47	2/20/47	12/19/47	303	79,350.45	-	-	-	49	152	201	-	102	102
" William Kendrick	Addendum #4	4/23/47	2/22/47	4/24/47	62	16,374.37	-	-	-	-	62	62	-	-	-
" James Bowdoin	Addendum #4	4/23/47	3/13/47	11/29/47	262(C)	68,529.31	-	-	-	-	262	262	-	-	-
" George Vancouver	Addendum #4	4/23/47	4/11/47	12/11/47	245	63,985.87	-	-	-	-	159	159	-	86	86
" Washington Irving	Addendum #6	6/ 9/47	5/21/47	11/14/47	178	46,499.28	-	-	-	-	112	112	-	66	66
Totals as included on Mystic S/S Division Final Accounting 8/1/51					2,698	$ 707,794.90	42	-	42	259	1905	2164	-	492	492
Differences- as noted by U.S.M.C.															
1) Basic Charter Hire- Per Cross Libel															
Total Chtr.Hire Paid- (Par.5, Page 3)						$1,172,872.01									
Less- "Addtl." Chtr.Hire Paid- As Agreed						$464,876.09									
- "Basic" " " " - As Above						707,794.90									
						1,172,670.99									
Difference						$ 201.02									
						201.02									
Total Per U.S.M.C.						$ 707,995.92									
2) Terminated Voyage Days considered by Mystic S/S as applicable to Acctg.Period- 1/1/47 - 10/31/47 but used by U.S.M.C. as being applicable to Foreign Trade Addendum period 9/1/47- 12/31/47 S/S "E.Dickinson" and S/S "J.Bowdoin"							-	-	-	-	(123)	(123)	-	123	123
Totals as Included by U.S.M.C. in Their Revised Sup. Accounting Report Dated 8/20/54							42	-	42	259	1782	2041	-	615	615

CW - 301 Days
OB - 1782 "
FTA - 615 "
2698

Notes
(A) - See Copies of Attached Statements(3) which were filed with Final Preliminary Determinations of Additional Charter Hire during 1947 - 1948
#1 - 11/1/46 - 12/31/46 - 42 Days - $ 10,916.25
2 - 1/1/47 - 11/30/47 - 2164 " - 568,052.35
3 - 9/1/47 - 12/31/47 - 492 " - 128,826.30
2698 " $707,794.90

(B) - Time Chartered to U.S.Army - 1/8/47 - 4/25/47

(C) - Time Chartered to U.S.Army - 3/13/47- 6/11/47

FAC
8/16/60

W. W. BATTIE & CO., INC.
STEAMSHIP BROKERS
PRODUCE EXCHANGE
NEW YORK

BOYD, WEIR & SEWELL, INC.
STEAMSHIP AGENTS
AND BROKERS
39 STATE STREET - NEW YORK

WELSH FORM
ADAPTED TO AMERICAN USE NOVEMBER, 1946
#700-A CM

New York, August, 2nd, 1947

It is this day mutually agreed, BETWEEN MYSTIC STEAMSHIP DIVISION, EASTERN GAS & FUEL ASSOCIATES, Bareboat chartered Owners of the American Steamship "WASHINGTON IRVING" of Portland, Ore., built 1942 at Portland, Ore., of 4374 tons net register or thereabouts, and about tons dead weight exclusive of bunkers, classed A-1 American Bureau of Shipping now and ASSOCIATION TECHNIJUE DE L'IMPORTATION CHARBONNIERE, Charterers.

1. That the said Steamer being tight, staunch and strong, and every way fitted for the Voyage, shall, with all possible dispatch, sail and proceed to NEW YORK, N.Y., PHILADELPHIA, PA., BALTIMORE, MD., NORFOLK or NEWPORT NEWS, VA., or CHARLESTON, S.C., at Charterers' option (one port only), as ordered on ~~arrival at lay days to count~~ and there load, always afloat, in the customary manner, from the Charterers, in such Dock as may be ordered by them a full and complete Cargo of NOMINATED Coal not exceeding 9,900 tons, nor less than 8,100 tons, and not exceeding what she can reasonably stow and carry, over and above her Tackle, Apparel, Provisions and Furniture; and being so loaded, shall therewith proceed, with all possible dispatch, to at Charterers' option, one or two safe ports NORTH FRANCE (Bordeaux-Dunkirk Range, both inclusive); or ANTWERP, Belgium or ROTTERDAM, Holland; or, at Charterers' option, one or two safe ports SOUTH FRANCE; or, at Charterers' option, one or two safe ports NORTH AFRICA (Casablanca-Tunisia Range, both inclusive). or so near thereunto as she can safely get, and there deliver her cargo alongside any Wharf, and/or Vessel and/or Craft, as ordered, where she can safely deliver, always afloat, but if required to shift, the expense of so doing to be paid by Consignees, and the time to count; on being paid Freight at the rate of As provided in Clause #26 on the reverse hereof U. S. Currency per ton ~~of 20 cwt. or 2,240 lbs. delivered, or on Bill of Lading quantity less two per cent at Receiver's option, to be declared in writing, before bulk is broken. If the Receiver should elect to weigh the Cargo at the port of destination, the weighing shall be done (by an official weigher) at his expense. The owner may provide a check weigher at Steamer's expense. Should any deficiency be alleged on the authority of such weighing it shall affect the freight only, from which no deduction shall be made for alleged shortage of cargo, any custom of the port of discharge notwithstanding, but the Owner shall furnish,~~ if required, a Statutory Declaration by the Master and other Officers that all the Cargo received on board has been delivered. The freight is in full of Loading, Trimming, and of all Port Charges, Pilotage, Agency Fees and Consulages on the Vessel. All Wharfage dues on the Cargo to be paid by the Charterers.

~~2. A sailing telegram to be sent to the Charterers or their Agents on Steamer leaving her last port, or in default twenty-four hours more to be allowed for loading. At least 7 days notice of approximate quantity of Cargo required and of steamer's expected date of arrival at port of loading or port of call for orders for loading port to be given to Charterers or their Agents.~~

2. The Cargo to be loaded into steamer with customary dispatch, but at not less than the average rate of 1500 tons per running day (excluding Bunkering time, Sundays, Custom House, Colliery, Legal and/or Local Holidays, and from noon on Saturday or the day previous to any such Holiday to 7 a. m. on Monday, or the day after any such Holiday, unless used) commencing 24 hours after steamer tenders and is ready to load, unless sooner berthed, whereupon time is to commence and written notice is given of the Steamer being completely discharged of inward cargo and ballast in all her holds, and ready to load, such notice to be given between business hours of 9 a. m. and 5 p. m., or 1 p. m. on Saturdays. Any time lost through riots, strikes, lock-outs, or any dispute between masters and men, occasioning a stoppage of pitmen, trimmers or other hands connected with the working or delivery of the coal for which the Steamer is stemmed, or by reason of accidents to mines or machinery, obstructions on the Railway or in the Docks; or by reason of floods, frosts, fogs, storms or any cause beyond the control of the Charterers, not to be computed as part of the loading time (unless any cargo be actually loaded during such time). In the event of any stoppage or stoppages arising from any of these causes continuing for the period of six running days from the time of the vessel being ready to load, this Charter shall become null and void; provided, however, that no cargo shall have been shipped on board the Steamer previous to such stoppage or stoppages. In case of partial holiday, or partial stoppage of Colliery or Collieries from any or either of the aforenamed causes, the lay-days to be extended proportionately to the diminution of output arising from such partial holiday or stoppage. If longer detained, Charterers to pay $1700.00 U. S. Currency per net register ton per running day (or pro rata for part thereof) demurrage. If sooner dispatched, Steamer to pay Charterers or their Agents $850.00 U. S. Currency per net register ton per running laydays (SAVED) day (or pro rata for part thereof) dispatch money. No deduction of time shall be allowed for stoppage, unless due notice be given at the time to the Master or Owner. If any dispute or difference should arise under this charter, same to be referred to three parties in the City of New York, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision, or any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of Court.

4. The Cargo to be loaded, dumped and trimmed by men appointed by the Charterers at the tariff rate of the Port, at vessel owner's expense.

5. Bunker Coal to be kept properly separated from the Cargo to Charterers' satisfaction at the Steamer's expense and the quantity to be endorsed on the Bills of Lading. If any Cargo is carried in a hold communicating directly with the Stokeholds, the doors to be securely fastened on the Cargo side.

6. The Bills of Lading shall be prepared in accordance with the Dock or Railway weight in the form endorsed on Charter, and shall be endorsed by the Master, Agent or Owner, weight unknown, freight and all conditions as per this Charter, such Bills of Lading to be signed at the Charterers' or Shippers' Office, within twenty-four hours after the Steamer is loaded.

7. The Act of God, the King's Enemies, Restraints of Princes and Rulers, and Perils of the Seas excepted. Also Fire, Barratry of the Master and Crew, Pirates, Collisions, Strandings and Accidents of Navigation, or latent defects in or accidents to, Hull and/or Machinery, and/or Boilers, always excepted, even when occasioned by the negligence, default or error in judgment of the Pilot, Master, Mariners, or other persons employed by the Shipowner, or for whose acts he is responsible, not resulting, however, in any case from want of due diligence by the Owner of the Ship, or by the Ship's Husband or Manager. Charterers not answerable for any negligence, default, or error in judgment of Trimmers or Stevedores employed in loading or discharging the Cargo. The Steamer has liberty to call at any ports in any order, to sail without Pilots, to tow and assist vessels in distress, and to deviate for the purpose of saving life or property, and to bunker. It is also mutually agreed that this shipment is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An Act relating to Navigation of Vessels, etc."

8. The Cargo to be taken from alongside by Consignees at Port of Discharge, free of expense and risk to the Steamer, at the average rate of as provided in Clause #26 on the reverse hereof tons per day, weather permitting, Sunday and Holidays excepted, provided Steamer can deliver it at this rate. If longer detained, Consignees to pay Steamer demurrage at the rate of $1700.00 U. S. Currency per net register ton per running day (or pro rata for that part thereof). If sooner dispatched, Steamer to pay Charterers or their Agents $850.00 U. S. Currency per net register ton per running lay days (SAVED) for part thereof) dispatch money. Time to commence twenty-four (24) hours, Sundays and Holidays excepted, after Steamer is ready to unload and written notice given, whether in berth or not, and the time allowable for discharging to be calculated on the basis of the Bill of Lading quantity. In case of strikes, lockouts, civil commotions, or any other causes or accidents beyond the control of the Consignees which prevents or delays the discharging, such time is not to count unless the Steamer is already on demurrage. Consignees to effect the discharge of the Cargo, Steamer paying ~~expense, steamer per ton of 20 cwt. or 2,240 lbs. on the Bill of lading quantity, and providing only steam, steam winches, winchmen, gins and falls.~~ at Charterers' risk and

9. The FREIGHT to be paid as provided in Clause #27 on the reverse hereof.

~~10. The Steamer to be free of address at Port of Discharge, but to pay the usual commission of Two per cent on the amount of Freight on signing Bills of Lading. Charterers have the option of making the Address Commission payable at Port of Discharge.~~

~~11. In case of damage, the same to be settled according to York/Antwerp Rules, 1924, and as if the vessel were British. Should the vessel put into any port or Ports leaky or with damage, the Captain or Owner shall, without delay, inform the Charterers thereof. Captain to telegraph Charterers in case of putting in anywhere.~~

12. Vessel not to tender before 9 a. m. on September 1st, 1947 and if Steamer be not ready at loading Port as ordered before 9 a. m. on September 15th, 1947 or if any wilful misrepresentation be made respecting the size, position or state of the Steamer, Charterers to have the option of cancelling this Charter, such option to be declared on notice of readiness being given.

13. Steamer to be consigned to Owners' Agents at Port of Loading, and At Port of Discharge

13a. Laydays to be reversible.

of call for orders for loading ports to be given to Charterers or their Agents.

3. The Cargo to be loaded into steamer with customary dispatch, but at not less than the average rate of 1500 tons per running day (excluding Bunkering time, Sundays, Custom House, Colliery, Legal and/or Local Holidays, and from noon on Saturday or the day previous to any such Holiday to 7 a. m. on Monday, or the day after any such Holiday, unless used) commencing 24 hours after steamer tenders and is ready to load, unless sooner berthed, whereupon time is to commence and written notice is given of the Steamer being completely discharged of inward cargo and ballast in all her holds, and ready to load; such notice to be given between business hours of 9 a. m. and 5 p. m., or 1 p. m. on Saturdays. Any time lost through riots, strikes, lock-outs, or any dispute between masters and men, occasioning a stoppage of pitmen, trimmers or other hands connected with the working or delivery of the coal for which the Steamer is stemmed, or by reason of accidents to mines or machinery, obstructions on the Railway or in the Docks; or by reason of floods, frosts, fogs, storms or any cause beyond the control of the Charterers, not to be computed as part of the loading time (unless any cargo be actually loaded during such time). In the event of any stoppage or stoppages arising from any of these causes continuing for the period of six running days from the time of the vessel being ready to load, this Charter shall become null and void; provided, however, that no cargo shall have been shipped on board the Steamer previous to such stoppage or stoppages. In case of partial holiday, or partial stoppage of Colliery or Collieries from any or either of the aforenamed causes, the lay days to be extended proportionately to the diminution of output arising from such partial holiday or stoppage. If longer detained, Charterers to pay $1700.00 U. S. Currency per net register ton per running day (or pro rata for part thereof) demurrage. If sooner dispatched, Steamer to pay Charterers or their Agents $850.00 U. S. Currency per net register ton per running laydays day (or pro rata for part thereof) dispatch money. No deduction of time shall be allowed for stoppage, unless due notice be given at the time to the Master or Owner. If any dispute or difference should arise under this charter, same to be referred to three parties in the City of New York, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision, or any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of Court.

4. The Cargo to be loaded, dumped and trimmed by men appointed by the Charterers at the tariff rate of the Port, at vessel owner's expense.

5. Bunker Coal to be kept properly separated from the Cargo to Charterers' satisfaction at the Steamer's expense and the quantity to be endorsed on the Bills of Lading. If any Cargo is carried in a hold communicating directly with the Stokeholds, the doors to be securely fastened on the Cargo side.

6. The Bills of Lading shall be prepared in accordance with the Dock or Railway weight in the form endorsed on Charter, and shall be endorsed by the Master, Agent or Owner, weight unknown, freight and all conditions as per this Charter, such Bills of Lading to be signed at the Charterers' or Shippers' Office, within twenty-four hours after the Steamer is loaded.

7. The Act of God, the King's Enemies, Restraints of Princes and Rulers, and Perils of the Seas excepted. Also Fire, Barratry of the Master and Crew, Pirates, Collisions, Strandings and Accidents of Navigation, or latent defects in or accidents to, Hull and/or Machinery, and/or Boilers, always excepted, even when occasioned by the negligence, default or error in judgment of the Pilot, Master, Mariners, or other persons employed by the Shipowner, or for whose acts he is responsible, not resulting, however, in any case from want of due diligence by the Owner of the Ship, or by the Ship's Husband or Manager. Charterers not answerable for any negligence, default, or error in judgment of Trimmers or Stevedores employed in loading or discharging the Cargo. The Steamer has liberty to call at any ports in any order, to sail without Pilots, to tow and assist vessels in distress, and to deviate for the purpose of saving life or property, and to bunker. It is also mutually agreed that this shipment is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An Act relating to Navigation of Vessels, etc."

8. The Cargo to be taken from alongside by Consignees at Port of Discharge, free of expense and risk to the Steamer, at the average rate of as provided in Clause #26 on the reverse hereof tons per day, weather permitting, Sundays and Holidays excepted, provided Steamer can deliver it at this rate. If longer detained, Consignees to pay Steamer demurrage at the rate of $1700.00 U. S. Currency per net register ton per running day (or pro rata for that part thereof). If laydays sooner dispatched, Steamer to pay Charterers or their Agents $850.00 U. S. Currency per net register ton per running lay days for pro rata for part thereof) dispatch money. Time to commence twenty-four (24) hours, Sundays and Holidays excepted, after Steamer is ready to unload and written notice given, whether in berth or not, and the time allowable for discharging to be calculated on the basis of the Bill of Lading quantity. In case of strikes, lockouts, civil commotions, or any other causes or accidents beyond the control of the Consignees which prevents or delays the discharging, such time is not to count unless the Steamer is already on demurrage, Consignees to effect the discharge of the Cargo, Steamer paying at Charterers' risk and expense, steamer per hour of 60 cwts, or 1,345 kilos, on the bill of lading quantity, and providing only steam, steam-winches, winchmen, gins and falls.

9. The FREIGHT to be paid as provided in Clause #27 on the reverse hereof.

10. The Steamer to be free of address at Port of Discharge, but to pay the usual commission of Two per cent. on the amount of Freight on signing Bills of Lading. Charterers have the option of making the Address Commission payable at Port of Discharge.

11. In case of demurrage, the same to be settled according to York/Antwerp Rules, 1924, and as if the vessel were British. Should the vessel put into any port or Ports leaky or with damage, the Captain or Owner shall, without delay, inform the Charterers thereof. Captain to telegraph Charterers in case of putting in anywhere.

12. Vessel not to tender before 9 a. m. on September 1st, 1947 and if Steamer be not ready at loading Port as ordered before 9 a. m. on September 13th, 1947 or if any wilful misrepresentation be made respecting the size, position or state of the Steamer, Charterers to have the option of cancelling this Charter, such option to be declared on notice of readiness being given.

13. Steamer to be consigned to Owners' Agents at Port of Loading, and At Port of Discharge

13a. Laydays to be reversible.

14. It is understood that no despatch money is collectible on the 24 hours mentioned in Clause No. 3.

15. Vessel to have the liberty of drydocking before commencement of loading under this Charter.

16. All notices under this Charter at Port of Discharge, or for orders, to be given in writing in Consignees' Agents' office on working days between the hours of 9 a. m. and 5 p. m. and 9 a. m. and Noon on Saturdays.

17. All Bills of Lading shall include the following: NEW JASON CLAUSE: In the event of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequences of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods.

If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if such salving ship or ships belonged to strangers. Such deposit as the carrier or his agents may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery.

18. All Bills of Lading shall include the following:—"CLAUSE PARAMOUNT. This Bill of Lading shall have the effect subject to the provisions of the Carriage of Goods by Sea Act of the United States approved April 16th, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender of the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any terms of this Bill of Lading be repugnant to said Act to any extent, such term shall be void to that extent but no further."

19. All Bills of Lading shall include the following: BOTH-TO-BLAME COLLISION CLAUSE: If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.

20. The Charterers' liability shall cease as soon as the cargo is shipped, and the advance of Freight, Dead Freight and Demurrage in Loading (if any) are paid, the Owner having a lien on the cargo for Freight, Demurrage and Average.

21. Penalty for non-performance of this Agreement, proved damages, not exceeding the estimated amount of Freight.

22. A commission of 4½ per cent. on the amount of Freight, Dead Freight and Demurrage is due by the Vessel and Owners on shipment of cargo to W. W. BATTIE & CO., Inc., Boyd, Weir & Sewell, Inc., and others.

23. The following clauses attached hereto are considered as part of this charterparty as though fully set forth herein: (i) Clause Paramount; (ii) Both-to-Blame Collision Clause; (iii) General Average Clause; (iv) Amended Jason Clause; (v) Liberties Clauses.

Clauses #24 through #33 on the reverse hereof to be considered part of this charterparty as though fully set forth above.

POUR L'ETAT ARMATEUR
ASSOCIATION TECHNIQUE DE L'IMPORTATION CHARBONNIERE
AGENCE DU MINISTERE DE LA MARINE MARCHANDE
POUR AUTORISATION D'ACTE - PARIS TRANSMISE
DE DÉSAPPROPRIEMENT POUR LE GOUVERNEMENT DES
COMPTOIRS D'APPROVISIONNEMENT DE PARIS

MYSTIC STEAMSHIP DIVISION
EASTERN GAS AND FUEL ASSOCIATES,
By L.C. Goodwin, Vice President.

24. Charterers have the option of shipping not more than 250 tons of COKE at the same rate of freight as the COAL, Charterers paying all additional expenses.

25. Owners to give ATIC, Room 1205, 44 Beaver Street, New York City, at least ten days' notice of steamer's expected readiness to load and approximate quantity vessel will lift; and ATIC, 44 Beaver Street, New York City, to declare name of loading port at least 7 days prior to vessel's expected readiness to load.

26. FREIGHT RATES: RATES OF DISCHARGE:

(a) Charterers have the option of discharging cargo in one of the Ranges mentioned below; if the vessel is loaded at Philadelphia, Baltimore, Norfolk or Newport News, the respective base rate of freight and the corresponding daily rate of discharge are to apply, as follows:

IF ONE PORT OF DISCHARGE USED:		U.S.CY.PER TON OF 2240 LBS.	DAILY RATE OF DISCHARGE
1. At a French Atlantic port(between Bordeaux and Dunkirk,both inclusive).....		$ 8.15	1000 Tons
Antwerp,Belgium or Rotterdam, Holland		7.15	2500 "
2. At a French Mediterranean port:	(Caronte	8.60	1300 "
	(Toulon	8.60	1300 "
	(Sete	8.75	1200 "
	(Nice	11.65	500 "
	(All other ports	9.20	1000 "
3. At a French North African port	(between Casablanca and Tunisia, both inclusive):		
	(Casablanca	6.85	1500 "
	(Algiers or Oran	8.40	1500 "
	(All other ports Algeria	9.85	750 "
	(Tunisia	9.85	750 "

(b) If the vessel is loaded at New York, N.Y., above base rates of freight to be increased Fifty Cents (50¢) U.S. Cy. per ton.

(c) If the vessel is loaded at Charleston,S.C., the above base rates of freight to be increased Fifty Cents (50¢) U.S. Cy. per ton.

(d) Charterers have the option of discharging at two ports in the same Range, in which case freight rate above to be increased Fifty Cents (50¢) U.S. Cy. per ton over the applicable rate to each port of discharge.

(e) If two ports of discharge are used, same to be in geographical rotation and vessel to be left in seaworthy trim for shifting between ports. Orders for second port of discharge, if used, to be given not later than on vessel's arrival at first port of discharge. At second port, time to commence when notice of readiness is given.

(f) If Casablanca is used as one of two ports in the North African Range, freight rate for Casablanca to be the same as the rate for Algiers.

(g) If Antwerp or Rotterdam is used, same to be sole port of discharge.

27. FREIGHT PAYMENT CLAUSE:

Full freight shall be deemed earned on the cargo as same is loaded aboard vessel, vessel and/or cargo subsequently lost or not lost. 90% of the freight to be paid by Charterers at New York in U.S. currency per ton of 2240 lbs. on Bill of lading quantity within eight days after the full set of signed original Bills of Lading, excluding one original which is to be placed aboard vessel in consignee's mail, and time sheets in quintuplicate signed by the Captain and shipper's agents in the port have been surrendered to ASSOCIATION TECHNIQUE DE L'IMPORTATION CHARBONNIERE, 44 Beaver Street, New York 4, N.Y. Balance of freight, extra freight, if any, despatch and/or demurrage to be settled in New York as above on presentation of final accounts with vouchers in quintuplicate signed by receivers or their agents and the Captain or Owners or their agents including time sheets at discharging ports.

28. Reference is hereby made to the declaration of trust establishing Eastern Gas & Fuel Associates dated July 18, 1929, a copy of which has been filed with the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts. The name "Eastern Gas & Fuel Associates" refers to the trustees under said Declaration of Trust as trustees and not personally, and no trustee, shareholder, officer or agent of Eastern Gas & Fuel Associates shall be held to any personal liability in connection with the affairs of said Associates, but the trust estate only is liable.

29. It is understood that the Owners of the vessel (United States and/or Maritime Commission) have the right under Clause 14 of the bareboat charter existing between the Owners of the vessel and Mystic Steamship Division, Eastern Gas & Fuel Associates (Bareboat Charterers) to terminate the period of use of the vessel by giving written notice to the Bareboat Charterers at least 15 days prior to the termination of any voyage. Should the Owners of the vessel exercise this prerogative or any other prerogatives it may have under the bareboat charter existing with Mystic Steamship Division, Eastern Gas & Fuel Associates that might frustrate the performance of this charter, then this charter to be cancelled without penalty or liability on the part of any of the parties hereto. The Bareboat Chartered Owner shall have the option of substituting a similar Liberty steamer in a similar position if this charter is so cancelled.

30. This contract is subject to the approval of the U.S. Maritime Commission.

31. LIGHTERAGE CLAUSE:

If there is insufficient water for vessel to reach her ultimate port of discharge without lightening, Charterers undertake to discharge at one of the below listed lightening ports sufficient cargo, as required by Master, to enable vessel to proceed with safety to port of discharge. All extra expenses incurred thereby, including port charges at lightening port (see Note A below) to be for Charterers' account, and time occupied to count as laytime, excluding steaming time from lightening port to port of discharge. Notice of readiness will be given by Master at lightening port. (see Note B below).

NOTE A: It is understood that the term "extra expenses incurred" appearing in this clause means the difference between the total amount of usual vessel expenses in both ports (i.e., lightening port and ultimate port of discharge), and the amount vessel would have had to pay if discharging full cargo at the ultimate port of discharge. This latter amount to be shown by a proforma disbursement account drawn up by the vessel's agent and certified exact by the Consignee and/or A.T.I.C.

NOTE B: Notice of readiness to discharge is to be given at lightening port. Time to commence twenty-four (24) hours after vessel is ready to unload and written notice of readiness has been given, whether in berth or not. Sundays and holidays to be excepted, unless used, in which case time used for lightening only to count as laytime. Time to stop

3. At a French North African port (between Casablanca and Tunisia, both inclusive):			
(Casablanca	$ 6.85	1500	"
(Algiers or Oran	$ 8.40	1500	"
(All other ports Algeria	$ 9.85	750	"
(Tunisia	$ 9.85	750	"

(b) If the vessel is loaded at New York, N.Y., above base rates of freight to be increased Fifty Cents (50¢) U.S. Cy. per ton.

(c) If the vessel is loaded at Charleston,S.C., the above base rates of freight to be increased Fifty Cents (50¢) U.S. Cy. per ton..

(d) Charterers have the option of discharging at two ports in the same Range, in which case freight rate above to be increased Fifty Cents (50¢) U.S. Cy. per ton over the applicable rate to each port of discharge.

(e) If two ports of discharge are used, same to be in geographical rotation and vessel to be left in seaworthy trim for shifting between ports. Orders for second port of discharge, if used, to be given not later than on vessel's arrival at first port of discharge. At second port, time to commence when notice of readiness is given.

(f) If Casablanca is used as one of two ports in the North African Range, freight rate for Casablanca to be the same as the rate for Algiers.

(g) If Antwerp or Rotterdam is used, same to be sole port of discharge.

27. FREIGHT PAYMENT CLAUSE:
Full freight shall be deemed earned on the cargo as same is loaded aboard vessel, vessel and/or cargo subsequently lost or not lost. 90% of the freight to be paid by Charterers at New York in U.S. currency per ton of 2240 lbs. on Bill of lading quantity within eight days after the full set of signed original Bills of Lading, excluding one original which is to be placed aboard vessel in consignee's mail, and time sheets in quintuplicate signed by the Captain and shipper's agents in the port have been surrendered to ASSOCIATION TECHNIQUE DE L'IMPORTATION CHARBONNIERE, 44 Beaver Street, New York 4, N.Y. Balance of freight, extra freight, if any, despatch and/or demurrage to be settled in New York as above on presentation of final accounts with vouchers in quintuplicate signed by receivers or their agents and the Captain or Owners or their agents including time sheets at discharging ports.

28. Reference is hereby made to the declaration of trust establishing Eastern Gas & Fuel Associates dated July 18, 1929, a copy of which has been filed with the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts. The name "Eastern Gas & Fuel Associates" refers to the trustees under said Declaration of Trust as trustees and not personally, and no trustee, shareholder, officer or agent of Eastern Gas & Fuel Associates shall be held to any personal liability in connection with the affairs of said Associates, but the trust estate only is liable.

29. It is understood that the Owners of the vessel (United States and/or Maritime Commission) have the right under Clause #14 of the bareboat charter existing between the Owners of the vessel and Mystic Steamship Division, Eastern Gas & Fuel Associates (Bareboat Charterers) to terminate the period of use of the vessel by giving written notice to the Bareboat Charterers at least 15 days prior to the termination of any voyage. Should the Owners of the vessel exercise this prerogative or any other prerogatives it may have under the bareboat charter existing with Mystic Steamship Division, Eastern Gas & Fuel Associates that might frustrate the performance of this charter, then this charter to be cancelled without penalty or liability on the part of any of the parties hereto. The Bareboat Chartered Owner shall have the option of substituting a similar Liberty steamer in a similar position if this charter is so cancelled.

30. This contract is subject to the approval of the U.S. Maritime Commission.

31. LIGHTERAGE CLAUSE:
If there is insufficient water for vessel to reach her ultimate port of discharge without lightening, Charterers undertake to discharge at one of the below listed lightening ports sufficient cargo, as required by Master, to enable vessel to proceed with safety to port of discharge. All extra expenses incurred thereby, including port charges at lightening port (see Note A below) to be for Charterers' account, and time occupied to count as laytime, excluding steaming time from lightening port to port of discharge. Notice of readiness will be given by Master at lightening port. (see Note B below).

NOTE A: It is understood that the term "extra expenses incurred" appearing in this clause means the difference between the total amount of usual vessel expenses in both ports (i.e., lightening port and ultimate port of discharge), and the amount vessel would have had to pay if discharging full cargo at the ultimate port of discharge. This latter amount to be shown by a proforma disbursement account drawn up by the vessel's agent and certified exact by the Consignee and/or A.T.I.C.

NOTE B: Notice of readiness to discharge is to be given at lightening port. Time to commence twenty-four (24) hours after vessel is ready to unload and written notice of readiness has been given, whether in berth or not. Sundays and holidays to be excepted, unless used, in which case time used for lightening only to count as laytime. Time to stop at departure of vessel from lightening port. If, after completion of discharge of the quantity of cargo necessary in Master's opinion to sufficiently lighten vessel, there is time left while vessel is awaiting favorable tide for sailing, Charterers have the option of discharging additional cargo during such time. Any time lost at lightening port for any reason other than for lightening cargo and/or waiting for tide to be for account of the vessel, unless the vessel is already on demurrage.
Time to be resumed when vessel arrives at ultimate port of discharge, whether in berth or not.
This clause applies to the below listed ports of discharge with respective lightening port, at Charterers' option.

DISCHARGING PORT	LIGHTENING PORT
ROUEN	LE HAVRE, CHERBOURG, BREST (If Cherbourg or Brest, Charterers to declare port of lightening in sufficient time to reach vessel before expected arrival off Cherbourg or Brest).
NANTES	SAINT NAZAIRE
PORT DE BORDEAUX, BLAYE, LE MARQUIS, BASSENS.....	PAULLIAC
PORT DE BOUC, CARONTE	MARSEILLES

Above terms to apply to any other ports where lightening may be required.
All other terms, conditions and exceptions of charterparty are to remain unchanged.

32. French Wireless and Sailing Information clauses attached hereto form a part of this charterparty as though fully incorporated herein.

33. Wherever the word "Owner" appears throughout this charterparty "Bareboat Chartered Owner" to apply.

(i) Clause Paramount:

"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent but no further."

(ii) Both-To-Blame Collision Clause:

"If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or noncarrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or noncarrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or noncarrying ship or her owners as part of their claim against the carrying ship or carrier. The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact."

(iii) General Average Clause:

"General average shall be adjusted, stated, and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive, and Rule F of York-Antwerp Rules 1924, at such port or place in the United States as may be selected by the carrier, and as to matters not provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment, disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required by the carrier, must be furnished before delivery of the goods. Such cash deposit as the carrier or his agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall, if required, be made by the goods, shippers, consignees, or owners of the goods to the carrier before delivery. Such deposit shall, at the option of the carrier, be payable in United States money, and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the general average and refunds or credit balances, if any, shall be paid in United States money."

(iv) Amended "Jason" Clause:

"In the event of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the carrier is not responsible by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if the salving ship or ships belong to strangers."

(v) Liberties Clauses:

"In any situation whatsoever and wheresoever occurring and whether existing or anticipated before commencement of or during the voyage which in the judgment of the carrier or master is likely to give rise to risk of capture, seizure, detention, damages, delay or disadvantage to or loss of the ship or any part of her cargo, or to make it unsafe, imprudent, or unlawful for any reason to commence or proceed on or continue the voyage or to enter or discharge the goods at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge in such port, the carrier may before loading or before the commencement of the voyage, require the shipper or other person entitled thereto to take delivery of the goods at port of shipment and upon their failure to do so, may warehouse the goods at the risk and expense of the goods; or the carrier or master, whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the goods there, may discharge the goods into depot, lazaretto, craft or other place; or the ship may proceed or return, directly or indirectly, to or stop at any such port or place whatsoever as the master or the carrier may consider safe or advisable under the circumstances, and discharge the goods, or any part thereof, at any such port or place; or the carrier or the master may retain the cargo on board until the return trip or until such time as the carrier or the master thinks advisable and discharge the goods at any place whatsoever as herein provided; or the carrier or the master may discharge and forward the goods by any means at the risk and expense of the goods. The carrier or the master is not required to give notice of discharge of the goods or the forwarding thereof as herein provided. When the goods are discharged from the ship, as herein provided, they shall be at their own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the carrier shall be freed from any further responsibility. For any service rendered to the goods as herein provided the carrier shall be entitled to a reasonable extra compensation.

"The carrier, master and ship shall have liberty to comply with any orders or directions as to loading departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any

... to such act to any extent, such term shall be void to that extent but no further."

(ii) Both-To-Blame Collision Clause:

"If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or noncarrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or noncarrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or noncarrying ship or her owners as part of their claim against the carrying ship or carrier. The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact."

(iii) General Average Clause:

"General average shall be adjusted, stated, and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive, and Rule 7 of York-Antwerp Rules 1924, at such port or place in the United States as may be selected by the carrier, and as to matters not provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment, disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required by the carrier, must be furnished before delivery of the goods. Such cash deposit as the carrier or his agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall, if required, be made by the goods, shippers, consignees, or owners of the goods to the carrier before delivery. Such deposit shall, at the option of the carrier, be payable in United States money, and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the general average and refunds or credit balances, if any, shall be paid in United States money."

(iv) Amended "Jason" Clause:

"In the event of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the carrier is not responsible by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if the salving ship or ships belong to strangers."

(v) Liberties Clauses:

"In any situation whatsoever and wheresoever occurring and whether existing or anticipated before commencement of or during the voyage which in the judgment of the carrier or master is likely to give rise to risk of capture, seizure, detention, damages, delay or disadvantage to or loss of the ship or any part of her cargo, or to make it unsafe, imprudent, or unlawful for any reason to commence or proceed on or continue the voyage or to enter or discharge the goods at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge in such port, the carrier may before loading or before the commencement of the voyage, require the shipper or other person entitled thereto to take delivery of the goods at port of shipment and upon their failure to do so, may warehouse the goods at the risk and expense of the goods; or the carrier or master, whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the goods there, may discharge the goods into depot, lazaretto, craft or other place; or the ship may proceed or return, directly or indirectly, to or stop at any such port or place whatsoever as the master or the carrier may consider safe or advisable under the circumstances, and discharge the goods, or any part thereof, at any such port or place; or the carrier or the master may retain the cargo on board until the return trip or until such time as the carrier or the master thinks advisable and discharge the goods at any place whatsoever as herein provided; or the carrier or the master may discharge and forward the goods by any means at the risk and expense of the goods. The carrier or the master is not required to give notice of discharge of the goods or the forwarding thereof as herein provided. When the goods are discharged from the ship, as herein provided, they shall be at their own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the carrier shall be freed from any further responsibility. For any service rendered to the goods as herein provided the carrier shall be entitled to a reasonable extra compensation.

"The carrier, master and ship shall have liberty to comply with any orders or directions as to loading departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions. Delivery or other disposition of the goods in accordance with such orders or directions shall be a fulfillment of the contract voyage. The ship may carry contraband, explosives, munitions, warlike stores, hazardous cargo, and may sail armed or unarmed and with or without convoy.

"In addition to all other liberties herein the carrier shall have the right to withhold delivery of, reship to, deposit or discharge the goods at any place whatsoever, surrender or dispose of the goods in accordance with any direction, condition or agreement imposed upon or exacted from the carrier by any government or department thereof or any person purporting to act with the authority of either of them. In any of the above circumstances the goods shall be solely at their risk and expense and all expenses and charges so incurred shall be payable by the owner or consignee thereof and shall be a lien on the goods."

September 11, 1946

The following special provisions to be inserted in all charterparties for vessels carrying Coal and copy of this memorandum to be in the hands of the Captain prior to sailing:

(a) CAPTAIN'S CABLES FOR CARGOES DESTINED TO CONTINENTAL FRANCE:
The Captain is to wireless to TRANSMARITIME PARIS for instructions and send a copy of this wire to ATICHARBON PARIS for information only as soon as possible and in no event later than 72 hours in advance asking for his first discharging port (or for confirmation of his first discharging port if a port has already been nominated to him), and give his expected fore & aft draft upon arrival. Instructions as to port of discharge will be given to him through BORDEAUX PORT RADIO STATION.

When the discharging port is definitely assigned, the Captain will wireless notice of his arrival about 48 hours in advance:

— if bound to North France to: TRANSMARITIME LE HAVRE or TRANSMAR at all other French Atlantic ports.

— if bound to South France to: TRANSMARITIME MARSEILLES whether ship is to discharge at Marseilles, Port Louis du Rhone, Caronte, Toulon, Nice or Sete.

to: TRANSMARITIME SETE if vessel can enter the port of Sete without first lightening in another Southern French port.

(b) CAPTAINS' CABLES FOR CARGOES DESTINED TO NORTH AFRICA AND MOROCCO:

The Captain is to wireless at least 72 hours prior to his arrival at Gibraltar to TRANSMARITIME ALGIERS for instructions and send one copy of this wire to ATICAFRI ALGIERS for their information only asking for instructions for specific port or ports of discharge.

Once the discharging port has been assigned to him, the Captain will wireless notice of his arrival about 48 hours in advance.

to: TRANSMARITIME ALGIERS or
TRANSMAR at all other North African Ports.

(c) SAILING INFORMATION:

On departure of the vessel, the master or his agent is to advise the French Shipping Mission, 1811 R Street, N.W., Washington, D.C., (Cable address "MISMAR WASHINGTON") by telegram or airmail special delivery letter of:

- - - Date of Sailing
- - - Tonnage loaded
- - - Expected date of arrival
- - - expected fore & aft draft on arrival.

In the United States Court of Appeals for the First Circuit

No. 6035

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

APPELLEE'S RECORD APPENDIX

VOLUME I. DOCUMENT 9

[Caption Omitted]

AFFIDAVIT OF LAWRENCE F. LEDEBUR

UNITED STATES OF AMERICA,
District of Columbia, ss:

LAWRENCE F. LEDEBUR, being first duly sworn, deposes and says that:

1. I am an attorney in the Admiralty and Shipping Section of the United States Department of Justice and am familiar with the matters pertaining to the cross-libel filed by the United States in the within proceeding.

2. This affidavit is made in support of the Government's memorandum in opposition to libelant's exceptions and exceptive allegations to the cross-libel.

3. In its reply memorandum, dated July 19, 1961, libelant discusses (Point III, H) the alleged "proper" method of calculating additional charter hire under the Government's theories, and refers to the supplemental affidavit of Robert A. Caswell, which affidavit purports to set forth such "proper" computation in this case.

4. This identical argument was advanced by the charterer in *United States* v. *East Harbor Trading Corporation* (S.D.N.Y. 60 Civil 2362), said charterer being represented by J. Franklin Fort, Esquire, one of libelant's proctors in the instant case. In the *East Harbor* case, the charterer moved for summary judgment on this very point, and the Government introduced the affidavit of Melvin M. Mueller in opposition to said motion. Since the issues are identical, I have appended hereto as Exhibit 1 a true and accurate copy of the affidavit of Melvin M. Mueller as introduced in *East Harbor*. That affidavit completely destroys the contentions advanced by libelant on this "proper" calculation point.

• • • • •

/s/ LAWRENCE F. LEDEBUR.

Subscribed and sworn to before me this 27th day of December 1961.

/s/ AUDREY ANNE CRUMP,

Notary Public in and for the District of Columbia.

[SEAL.]

My commission expires August 31, 1966.

[Note: Exhibit 1 to the above affidavit (affidavit of Melvin M. Mueller in *United States* v. *East Harbor Trading Corporation*) is reproduced in pertinent part immediately below.]

Affidavit of Melvin M. Mueller

United States of America,
District of Columbia, ss:

Melvin M. Mueller, being first duly sworn, deposes and says that:

1. I am a citizen of the United States and a resident of Maryland, presently serving as Supervisory Auditor, Division of Audits, Office of the Comptroller, Maritime Administration, United States Department of Commerce. I have been employed by that agency and its predecessor agencies since August 5, 1942, except for a period of military service from April 1943 to January 1946. From the inception of the program for chartering Government-owned vessels under the Merchant Ship Sales Act of 1946 until approximately December 1950, I reviewed the preliminary statements submitted by the charterers, made analyses thereof, prepared billings for charter hire due the Government, and performed other duties relating to the calculation and collection of charter hire. I also assisted Maritime's field supervisory auditor in the New York area in making several field audits of various charterers. I make this affidavit to the best of my knowledge and belief, based upon my personal knowledge and upon my use and examination of the files of this agency and its predecessor agencies.

2. I have read the second supplemental affidavit of Philip J. Carroll (dated January 19, 1961) which has been filed in support of defendants' motion for summary judgment. Mr. Carroll therein purports to show by certain mathematical computations that the Maritime Administration has overcalculated the total additional charter hire due from defendant East Harbor Trading Corporation under Part II, Clause 13, of bareboat charter contract No. MA-30. This result is reached, according to Mr. Carroll, by adopting the Government's theory that the additional charter hire in excess of the statutory additional charter hire required to be collected under section 709(a) of the Mer-

chant Marine Act, 1936, was charged under authority of section 5(b) of the Merchant Ship Sales Act, 1946, *and* by accounting therefor in compliance with section 709(a). I disagree with Mr. Carroll's basic assumptions and conclusions for, as shown below, the Government has calculated East Harbor's obligation to pay additional charter hire in strict conformity with the requirements of Clause 13, and without violating the requirements of section 709(a).

* * * * *

6. Several fundamental principles are apparent from a reading of section 709(a), section 5(b), and Clause 13 of the charter:

(a) The statutory additional charter hire required to be paid by section 709(a) cannot be *separately* calculated until after profits have been reduced by the contractual (i.e., section 5(b)) charter hire due Maritime in accordance with the terms of the charter.

(b) The charter here fixed contractual (section 5(b)) hire of two types: a fixed monthly hire of $12,237.50, plus a further amount based upon the profits subject to Clause 13.

(c) Since contractual charter hire (i.e., "charter hire reserved in the charter") is an expense to be deducted from profits before calculating the charterer's section 709(a) obligations, it is obvious that for any given amount of *contractual* hire the profits subject to 709(a) are reduced by an amount equal to such contractual hire expense.

(d) The charterer's profits subject to the provisions of charter Clause 13 are therefore to be distributed as follows:

	Government's share:	Charterer's share:
(i)	Contractual (section 5(b)) additional charter hire	
(ii)		Allowable return (10% of investment)
(iii)	50% of remainder (section 709(a)) statutory additional charter hire	
(iv)		Remainder, equal to (iii)

In other words, the Government receives its contractual additional charter hire and one-half of all profits remain-

ing after payment of the charterer's allowable return, while the charterer receives its allowable return and an identical one-half of all profits remaining after payment thereof.

7. Turning now to the actual facts of this case, the following are the figures applicable to defendant East Harbor's liability for charter hire under Clause 13 (see Exhibit B to the affidavit of Philip J. Carroll, dated August 8, 1960):

(a) Profits subject to payment of the statutory and contractual additional charter hire due under charter Clause 13		$64,325.68
(b) Allocation of profits subject to Clause 13 among the three brackets of profit sharing contained in that provision		
(1) Profits not in excess of $100 per day	$13,400.00	
(2) Profits over $100, but not in excess of $300 per day	26,800.00	
(3) Profits in excess of $300 per day	24,125.68	
		$64,325.68
(c) Amount of profits subject to Clause 13 accruing to Maritime per that provision:		
(1) 50% of $13,400.00	$ 6,700.00	
(2) 75% of $26,800.00	20,100.00	
(3) 90% of $24,125.68	21,713.11	
		$48,513.11
(d) Amount of profits subject to Clause 13 accruing to charterer per that provision		$15,812.57
(e) Total profits distributed per Clause 13 ((c) plus (d))		$64,325.68

8. Mr. Carroll does not attack the Government's contention that Clause 13 combined both contractual (section 5(b)) additional charter hire *and* statutory (section 709(a)) additional charter hire (see paragraph 5, *supra*). However, he does assail the computation given above because it computes the total (combined, contractual and statutory) additional charter hire as a single amount ($48,513.11) due the Government and fails to show on its face that the requirements of section 709(a) have been met, i.e., fails to show that the result would have been identical if the contractual (section 5(b)) additional charter hire portion had been deducted from profits before the Government's statutory (section 709(a)) additional charter hire portion was computed.

Although Judge Kaufman has already held Clause 13 valid if it was intended to include both contractual and statutory additional charter hire (and I understand that defendants' present motion proceeds on that assumption), it is nevertheless a simple matter to satisfy Mr. Carroll's curiosity and to show that the $48,513.11 due Maritime as *total* additional charter hire is properly composed of amounts representing contractual (section 5(b)) additional charter hire and statutory (section 709(a)) additional hire, and that the computation of such amounts fully conforms to all statutory requirements. *Whether those amounts are calculated simultaneously as a single product (as was actually done here—see paragraph 7, supra), or whether they are calculated separately as shown below, they are identical.*

9. Thus, as is shown in the following table, the $48,513.11 due the Government under Clause 13 is composed of contractual (section 5(b)) additional charter hire of $32,700.54, and of statutory (section 709(a)) additional charter hire of $15,812.57:

	Net Profit and Additional Charter Hire under Sections 5(b) and 709(a)			§709(a) Profits	§5(b) Additional Charter Hire
	Thru $100 per day	Over $100 Thru $300 per day	Over $300 per day		
Total net profit subject to payment of contractual (§5(b)) and statutory (§709(a)) additional charter hire (see line (b), paragraph 7, *supra*)	$13,400.00	$26,800.60	$24,125.68		
Additional charter hire under sections 5(b) and 709(a):					
50%	6,700.00				
75%		20,100.00			
90%			21,713.11		
Net profits retainable by defendant under §709(a)	6,700.00	6,700.00	2,412.57	15,812.57	
Net profits payable to Maritime under §709(a) (same as line above)	6,700.00	6,700.00	2,412.57	15,812.57	
Net profits payable to Maritime under §5(b):					

Payable under §5(b) & §709(a)

Thru $100	Over $100 Thru $300	Over $300	Total
6,700.00	20,100.00	21,713.11	48,513.11
Less Part Under §709(a)			
6,700.00	6,700.00	2,412.57	15,812.57
0.00	13,400.00	19,300.54	
Grand Total:			$64,325.68

§709(a) Profits	§5(b) Additional Charter Hire
	$32,700.54
$31,625.14	$32,700.54

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Proof that the above computation fully satisfies the requirements of section 709(a) is as follows:

(a) Total profit subject to payment of contractual and statutory additional charter hire	$64,325.68
(b) Less contractural additional charter hire due the Government under §5(b)	−$32,700.54
(c) Remaining profits to be divided equally between the charterer and the Government under §709(a)	$31,625.14
(d) Statutory additional charter hire due the Government under §709(a) (one-half of (c))	$15,812.57
(e) Charterer's share of profits subject to §709(a) (one-half of (c))	$15,812057

It can be seen from the above that the contractual additional charter hire is first deducted from profits as required by section 709(a), and that the remaining balance is then divided equally as required by the same section. There is therefore no validity to the assertion that "proper" computation produces different results from those arrived at when the total additional charter hire is calculated simultaneously (see paragraph 7, *supra*).

10. While the above proof of the Government's compliance with the requirements of section 709(a) are reached by a purely arithmetical procedure, it likewise is possible to show the validity of the Government's computation by simple algebraic substitution, as follows:

• • • • •

Thus, when computed arithmetically and algebraically, the charterer's liability for contractual additional charter hire amounts to $32,700.54, and its liability for statutory additional charter hire amounts to $15,812.50.

• • • • •

12. Any contention by Mr. Carroll that the Government did not follow the proper order required by section 709(a) in calculating the total additional charter hire due under charter Clause 13 is completely answered by the fact that Clause 13 provides for the *simultaneous* determination under both section 5(b) and section 709(a). When a *segre-*

gation between the two types of additional charter hire due under Clause 13 is made merely to test compliance with section 709(a), my calculations, as set out in the preceding paragraphs, show literal and complete compliance with section 709(a) by deducting (1) the basic or "fixed" hire, (2) the remaining contractual (additional charter) hire, and (3) the allowable return, before computing the amount to be divided equally with the charterer under section 709(a). Mr. Carroll's objections have therefore been met in every respect, and there is no validity to the claim that the Government charged East Harbor a total additional charter hire greater than that permitted by Clause 13 if the procedures required by section 709(a) are followed.

13. Mr. Carroll attempts to calculate the Government's entitlement to contractual and statutory additional charter hire on a different and wholly erroneous basis. He correctly reasons that section 709(a) required the Government to collect *statutory* additional charter hire equal to 50 percent of the charterer's excessive profits (after payment of contractual charter hire and the charterer's allowable return), and that any additional charter hire greater than such 50 percent must have been charged as *contractual* additional charter hire under section 5(b). He is therefore correct in his conclusion that all of the profits subject to the first (50%) bracket of Clause 13 were profits subject to section 709(a).

It is with the next step in Mr. Carroll's reasoning that I disagree, for he then concludes that of the profits ($26,800) subject to the second (75%) bracket of Clause 13, 50 percent must have been charged as statutory additional charter hire under section 709(a), and 25 percent as contractual additional charter hire under section 5(b). And he similarly concludes that 50 percent of the profits ($24,125.68) subject to the third (90%) bracket of Clause 13 was charged as statutory additional charter hire under section 709(a), and that 40 percent of such profits was charged as contractual additional charter hire under section 5(b).

On this reasoning (which is in error, as shown in para-

graphs 16-19, *infra*), Mr. Carroll then computes the Government's entitlement to contractual (section 5(b)) additional charter hire as follows:

. . . . . .

Mr. Carroll's conclusion that 25 percent of the second (75%) bracket and 40 percent of the third (90%) bracket represent contractual additional charter hire apparently stems from his uncritical acceptance of language contained in the affidavit of Charles E. Mintzell, dated September 28, 1960, and heretofore filed by plaintiff in this action. For purposes of therein illustrating the fact that the total additional charter hire charged under Clause 13 was a combination of statutory (section 709(a)) and contractual (section 5(b)) additional charter hire, Mr. Mintzell leaped to the same conclusion that is now advanced by Mr. Carroll. However, as Mr. Mintzell explains in a supplemental affidavit, which I understand is to be filed at the same time this affidavit is submitted to the Court, his purpose in making the statements referred to by Mr. Carroll were for illustration only and did not purport to represent the actual segregation of additional charter hire into its component parts. Mr. Mintzell further explains that the figures from which he derived his statement did not themselves segregate additional charter hire into contractual and statutory portions, and that at no time prior to the making of his affidavit was he or anyone else employed by this agency called upon to make such a segregation. With all due respect to Mr. Mintzell, it is obvious that his conclusions (submitted for purposes of illustration only) were in error, just as Mr. Carroll's identical conclusion is in error for the reasons hereinafter set forth.

14. In claiming that 25 percent of the profits in the second (75%) bracket was contractual additional charter hire, Mr. Carroll also claimed that 50 percent of the *remaining* profits in that bracket was statutory additional charter hire. Similarly, in claiming that 40 percent of the profits in the third (90%) bracket was contractual additional

charter hire, Mr. Carroll claimed that 50 percent of the *remaining* profits was statutory additional charter hire. He had already concluded (see paragraph 13, *supra*) that 50 percent of the profits in the first (50%) bracket was statutory additional charter hire. As a result, Mr. Carroll stated that the statutory additional charter hire due the Government was $23,987.70. While he did not show in detail the portions thereof allocable under his theory to each of the three brackets of profits set forth in Clause 13, it is obvious that his views are as follows:

* * * * *

An analysis of Mr. Carroll's figures points up the fundamental error inherent in his thesis, for the result thereof is to rewrite unilaterally the mutually-agreed-upon 50%-75%-90% sliding scale in Clause 13. Thus, according to Mr. Carroll, the profits subject to Clause 13 should have been distributed as follows:

Clause 13 brackets	Maritime's Portions Sec. 5(b)	Sec. 709(a)	Total	Charterer's Portion Under Sec. 709(a)
(i) $13,400.00	$ 0.00	$ 6,700.00(50%)	$ 6,700.00(50%)	$ 6,700.00(50%)
(ii) 26,800.00	6,700.00(25%)	10,050.00(37.5%)	16,750.09(62.5%)	10,050.00(37.5%)
(iii) 24,125.68	9,650.27(40%)	7,237.70(30%)	16,887.97(70%)	7,237.70(30%)
$64,325.68	$16,350.27	$23,987.70	$40,337.97	$23,987.70

In essence, Mr. Carroll is saying that when Clause 13 used the 50% rate as the first bracket in the sliding scale, it was intended that the Government collect 50% of the excess profits, but that when Clause 13 used the 75% rate as the second bracket, it was only intended that the Government collect 62.5% of the excess profits, and that when a 90% rate was used in the third bracket, it was intended that only 70% of the excess profits be collected. *He has changed a 50%-75%-90% scale agreed to by the parties into a 50%-62.5%-70% scale.* Under this type of reasoning, if the Government had wanted to recover 100% of any portion of the profits, it would have had to use a 150% rate.

15. Before explaining exactly *why* Mr. Carroll is in error, I would like to give one more example of the fallacious results produced by his reasoning. As explained in paragraph 13, *supra*, Mr. Carroll's basic premise is that 25 percent of the second (75%) bracket of profits and 40 percent of the third (90%) bracket of profits constitutes the contractual (section 5(b)) additional charter hire due the Government. If this assumption were correct (and I have shown that it is erroneous), the logically correlative assumption would be that 50 percent of such profits (i.e., 75% minus 25% and 90% minus 40%) was due the Government as statutory (section 709(a)) additional charter hire. Under this line of reasoning, the statutory additional charter hire would then be computed as follows:

* * * * * *

Non-existent profits have been distributed!

Of course, this result is absurd, but it is logically produced by the very hypothesis upon which Mr. Carroll proceeds, namely, the mistaken assumption that 25% of the second (75%) bracket and 40% of the third (90%) bracket represents contractual (section 5(b)) additional charter hire.

16. Turning now to the *reason* Mr. Carroll's theory produces illogical and erroneous results, it may first be observed that his (and Mr. Mintzell's initial) impression that

contractual additional charter hire is produced by 25 percent of the second (75%) bracket profits and 40 percent of the third (90%) bracket profits overlooks a basic fact: The 50-75-90 sliding scale of percentages was not inserted into the charter for the purpose of *segregating* contractual (section 5(b)) and statutory (section 709(a)) additional charter hire into two separate portions as Mr. Carroll insists must be done, but was inserted by the Commission when it approved the charter form in August 1946 so that *total* additional charter hire (both contractual and statutory) could be calculated in one operation to produce a single amount due the Government. The Commission was not interested in segregation, but in collection. Since section 709(a) merely required the Commission to collect 50 percent of the charterer's profits after payment of contractual charter hire, and did not impose any limitation upon such contractual charter hire, it is obvious that the Commission had only to ensure that Clause 13 would produce at least such 50 percent of profits. And since Clause 13 specifically granted the Government a share of profits on a 50%-75%-90% sliding scale, it was obvious that section 709(a) would be satisfied. There was therefore no need to segregate the contractual and statutory portions of the total amount accruing to the Government under that provision of the charter. [Consistent with this observation is the fact that neither Maritime nor any of the numerous charterers under the 1946 Act (including East Harbor) ever filed accountings deviating from Clause 13 and segregating the two types of additional charter hire therein produced as a single entity.]

17. What Mr. Carroll overlooked, then, was the fact that the percentages (50%-75%-90%) expressed in Clause 13 were intended to produce only single amounts representing *combined* contractual and statutory additional charter hire due the Government. In attempting to break down and allocate those percentages between contractual and statutory additional charter hire, Mr. Carroll ignored the requirement that his results would have to total the percentages with which he started (the whole equals the sum

of its parts), and he thus converted a 50%-75%-90% sliding scale into a 50%-62.5%-70% scale obviously not expressive of the stated intention of the parties. While such a result might presumably be desired by defendants, it obviously is not indicative of their intentions at the time they executed the charter.

18. All that Clause 13 required was that the Government and the charterer share equally (50% to the United States and 50% to the charterer) the first (50%) bracket of profits, that the Government obtain three-fourths (and the charterer one-fourth) of the second (75%) bracket of profits, and that the Government obtain nine-tenths (and the charterer one-tenth) of the third (90%) bracket of profits.

Since the charterer was entitled only to one-half of the profits subject to equal division under section 709(a), and was not to receive any other profits,[1] it is obvious that the parties considered the charterer's section 709(a) share to be 50 percent of the first (50%) bracket of profits, 25 percent of the second (75%) bracket of profits, and 10 percent of the third (90%) bracket of profits. And, since the Government was required to collect an *equal* amount as statutory additional charter hire under section 709(a), it is just as obvious that such statutory additional charter hire would be 50 percent of the first (50%) bracket, 25 percent of the second (75%) bracket, and 10 percent of the third (90%) bracket. The remainder of the Government's share (0% of the first bracket, 50% of the second bracket, and 80% of the third bracket), then, was the contractual (section 5(b)) additional charter hire. [Note that when a *proper* segregation of total profits is made (see paragraphs 9 and 10, *supra*), the percentages given above are fully complied with.]

19. One final observation might be made: if the 50%-75%-90% sliding scale agreed to by the parties in Clause 13 is disregarded (as has been done by Mr. Carroll), and

---

[1] I have shown that the charterer's allowable return had already been distributed. See paragraph 11, *supra*.

one merely attempts to divide the profits subject to Clause 13 ($64,325.68) so as to satisfy the requirements of section 709(a), an almost infinite number of solutions may be obtained as shown in the following table:

	(a) Profits to be divided per Clause 13	(b) Maritime's contractual ($5(b)) share	(c) Balance subject to division under §709(a)	(d) Maritime's §709(a) share (½ of (c))	(e) Charterer's §709(a) share (½ of (c))
(1)	$64,325.68	$ 0.02	$64,325.66	$32,162.83	$32,162.83
(2)	64,325.68	0.68	64,325.00	32,162.50	32,162.50
(3)	64,325.68	4,325.68	60,000.00	30,000.00	30,000.00
(4)	64,325.68	16,350.27	47,975.41	23,987.70	23,987.70
(5)	64,325.68	32,700.54	31,625.14	15,812.57	15,812.57
(6)	64,325.68	34,325.68	30,000.00	15,000.00	15,000.00
(7)	64,325.68	60,000.00	4,325.68	2,162.84	2,162.84
(8)	64,325.68	64,325.66	0.02	0.01	0.01

However, only one possible solution conforms to the contract requirement of a 50%-75%-90% sharing of profits. It is shown on line (5), above, and is the same solution arrived at both arithmetically and algebraically by me in paragraphs 9 and 10, *supra*.

There was therefore no necessity nor logic in Mr. Carroll's selection of a 50%-62.5%-70% sliding scale; if he was going to ignore the contract, he could have selected almost any other possible combination of percentages as shown above.

/s/ MELVIN M. MUELLER.

Subscribed and sworn to before me this 28th day of February 1961.

/s/ JENNIE W. DIAMOND,

NOTARY PUBLIC. [SEAL.]

My Commission expires September 30, 1964.

VOLUME I. DOCUMENT 12

[Caption Omitted]

STIPULATION

WHEREAS the libel herein of libelant-cross-respondent Massachusetts Trustees of Eastern Gas and Fuel Associates sets forth three separate causes of action and the cross-libel herein of respondent-cross-libelant United States of America sets forth four separate causes of action;

WHEREAS, on January 15, 1962, the Court issued its opinion that the final judgment when entered herein should include the dismissal of libelant-cross-respondent's first and second separate causes of action and the dismissal of respondent-cross-libelant's first separate cause of action;

WHEREAS the said opinion of January 15, 1962, recited that libelant-cross-respondent's third separate cause of action and respondent-cross-libelant's third and fourth separate causes of action should be decided on their merits at a plenary trial to be held thereafter;

WHEREAS the said opinion of January 15, 1962, further recited that respondent-cross-libelant was entitled to recover its damages on its second separate cause of action in an amount thereafter to be determined by further proceedings; and

WHEREAS the parties have settled and compromised libelant-cross-respondent's third separate cause of action and respondent-cross-libelant's third and fourth separate causes of action, and a decree implementing said settlement and compromise is to be entered by the Court herein:

NOW, THEREFORE, it is further stipulated by and between the parties to the above-entitled action as follows:

On the basis of the opinion of the Court entered herein on January 15, 1962, and without prejudice to the right of libelant-cross-respondent Massachusetts Trustees of Eastern Gas and Fuel Associates to seek reconsideration by the District Court of the dismissal of its second separate cause of action or to appeal from any judgment hereafter

entered thereon dismissing its first or second separate causes of action or awarding damages to respondent-cross-libelant on the latter's second separate cause of action, and without prejudice to the right of respondent-cross-libelant United States of America to appeal from any judgment hereafter entered thereon dismissing its first separate cause of action, the total amount of damages of respondent-cross-libelant United States of America recoverable on its second separate cause of action asserted in its cross-libel filed herein on February 15, 1960, shall be Sixty Four Thousand Dollars and No Cents ($64,000.00).

Dated: , 1962.

/s/ JAMES S. EASTHAM,
250 Stuart Street,
Boston, Massachusetts.

/s/ J. FRANKLIN FORT,
529 Tower Building,
Washington 5, D. C.
Proctors for Libelant-
Cross-Respondent.

/s/ DANIEL B. BICKFORD,
for W. ARTHUR GARRITY, JR.
United States Attorney.

/s/ LAWRENCE F. LEDEBUR,
Attorney, Admiralty & Shipping
Section, Department of Justice
Washington 25, D. C.
Proctors for Respondent-
Cross-Libelant.

SUPPLEMENT TO RECORD ON APPEAL CERTIFIED ON AUGUST 9, 1962.

[Affidavit of Charlie H. McDaniel]

[Caption omitted]

AFFIDAVIT OF CHARLIE H. MCDANIEL

UNITED STATES OF AMERICA,
District of Columbia, ss.

CHARLIE H. MCDANIEL, being first duly sworn, deposes and says that:

1. I am a citizen of the United States and a resident of the District of Columbia, presently serving as Chief, Division of Subsidy Contracts, Office of Government Aid, Maritime Administration, United States Department of Commerce. I have been employed by this agency and its predecessor agencies since January 2, 1919, except for three months in 1920 and nine months in 1932-33. I have specific and detailed personal knowledge of the facts underlying the adoption of the provisions concerning charter hire contained in the Form No. 303, SHIPSALESDEMISE bareboat charter (herein called "Form 303 charter"), which applied to warbuilt, dry-cargo vessels chartered under the Merchants Ship Sales Act of March 8, 1946, 60 Stat. 41, as amended, 50 U.S.C. App. 1735 *et seq.* (herein called the "1946 Act").

2. My knowledge of the facts was acquired from my service on both of two intra-agency committees which considered the fixing of charter hire under section 5 of the 1946 Act. I make this affidavit to the best of my knowledge and belief, based on my personal knowledge of the facts, both from personal experience and from my continued use and examination for many years of the files of this agency and its predecessor agencies.

3. The aforementioned committees began their deliberations after extensive hearings and debates had been held

by Congress on several ship sales bills, at which consideration had been given to the "Harvard Report" (House Merchant Marine Com. Doc. No. 48), June 1945, by the Harvard Graduate School of Business Administration, on "The Use and Disposition of Ships and Shipyards at the End of World War II," 325 pp. (S. Rep. No. 807, 79th Cong.).

4. The summary of recommendations contained in the Harvard Report made it clear that the basic policy recommended was with reference to the *sale* of ships. With respect to chartering, recommendation 2 of the Harvard Report (p. 3) proposed the following:

> (1) Some ships should be made available on a charter (lease) basis to both domestic and foreign operators who need ships temporarily until ships suited to their requirements can be built.
>
> (2) Liberty ships and ships over 15 years old should be made available for charter as soon as for sale. Other type ships should not be chartered until they have been offered for sale to all classes of purchasers and have not been sold.
>
> (3) *The charter price should be sufficiently high, as compared with the sales price, so that long-term chartering is discouraged.*
>
> (4) The charter period should not be less than one (1) year. [Emphasis supplied.]

The report, however, made it clear (p. 150) that, in general, chartering should be avoided:

> We feel that private operators who have invested their own capital in ships will render the best service to the country both for economic and security purposes. Chartering, however, by making it easier for operators to participate in the shipping business on a short-term basis with a smaller capital investment than is required if ships are purchased, would tend to lead some private operators to prefer short-run, low-capital operations.

* * * * *

> Since sales are preferable to charter, no ship should be chartered if there are purchasers available. • • •
>
> In order to prevent Government-owned ships from being used to meet purely seasonal demands and from exerting unfavorable pressure on ship markets, no charter should be for less than 12 months.

5. Reports of the congressional committees which considered the bill eventually enacted as the Merchant Ship Sales Act of 1946 clearly stated that the intent of the bill was to *dispose* of the Government-owned fleet. For example, H.R. Rep. No. 831, 79th Cong., 1st Sess. (1945), stated that the temporary chartering authority was to permit *re-establishing a trade or opening a new trade*. Similarly, S. Rep. No. 807, 79th Cong., 1st Sess. (1945), gave as the two objectives of the bill (1) a firm pricing policy for the *sale* of ships and (2) establishment of an inactive reserve "frozen so far as commercial use is concerned." That report considered Maritime's authority to charter as "necessarily a discretionary one to meet uncertainties particularly during the period of reconversion to peacetime operation • • •." And H.R. Rep. No. 1526, 79th Cong., 2d Sess. (1946) (conference report), stated that the conference bill did not include a Senate amendment forbidding Maritime from rejecting a charter application in order to deny operation of any kind or to restrict competition,

> • • • inasmuch as the discretion placed in the Commission by the section as to chartering will be governed by the declaration of policy and other provisions of the bill.

The congressional debates prior to passage of the 1946 Act similarly show the objective of sales, the dislike of chartering and the broad discretion lodged in Maritime.

6. Section 5(b) of the 1946 Act provided as follows:

> The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission as such rate as the Commission determines to be

consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rates for similar vessels for similar use as determined by the Commission.

It should be noted that at no time did the Maritime Commission by a vote of at least four commissioners approve a rate of charter hire less than 15 percentum per annum of the statutory sales price on dry-cargo vessels in foreign service operation. And section 709(a) of the 1936 Act (incorporated by reference into section 5(c) of the 1946 Act) provided:

> Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

7. The members of these two committees on which I served considered that, without the 50 percent provision for

additional charter hire in section 709(a) of the 1936 Act being incorporated into the 1946 Act, Maritime would have had full discretion under section 5(b) of the 1946 Act to fix hire by use of a fixed or firm basic hire plus a sliding scale of profit sharing additional hire or additional hire of any percent, as had been frequently done by the War Shipping Administration in Public Law 101 charters where the statutory requirement was only that the charter hire be fair and reasonable and the terms desirable for protection of the public interest. Some WSA charters themselves had a scale of additional charter hire which slid from 50 percent to 100 percent for failure to fulfill ship purchase commitments. No reason therefore appeared to the committees of which I was a member why the statutory additional charter hire of 50 percent in section 709(a) should limit Maritime's discretion to include further elements of profit sharing hire in fixing a contractual rate of hire under section 5(b), as long as the 50 percent statutory additional charter hire was also collected.

8. The first committee of seven, appointed May 31, 1946, included as a member Maritime's Assistant General Counsel Francis B. Goertner, and the second committee of eight, which began operating on August 1, 1946, had Maritime's General Counsel Wade H. Skinner, now deceased, as a member. At no time during the deliberations of the two committees, or in the Maritime Commission meetings, or previous thereto, was any legal view expressed, to my knowledge, by either Mr. Goertner or Mr. Skinner, or any other attorney with Maritime, to the effect that, apart from the question of meeting the world market rate and the 50 percent statutory additional hire set forth in section 709(a) of the 1936 Act, it would be unlawful to provide by contract for additional elements of profit sharing or "additional charter hire" at higher amounts. On the contrary, as appears more fully hereafter, General Counsel Skinner specifically approved of the "sliding scale" provision of the Form 303 charter which maintained the 50 percent rate required by statute but added additional contractual amounts.

9. In their deliberations, these two committees had the benefit of WSA's experience in chartering war-built vessels under Public Law 101. One mistake of fact affected the early thinking of those WSA officials who developed the rate used in the WSA interim charters of war-built vessels. That was the impression that British rates were lower, and that high charter rates to American placed the latter at a competitive disadvantage. The committees on which I served began to realize that the United States, having control of the great bulk of world tonnage, also controlled the world market, and that too low charter rates would permit undercutting on freight rates with extremely harmful results to pre-war American owners and post-war American vessel purchasers who were trying to establish themselves.

Large shipowners early warned WSA against promiscuous chartering in competition with owners without a determination of necessity for "the development and maintenance of the commerce of the United States and the national defense." To do so, it was said, would encourage indefinite postponement of the risks of purchasing, especially if the right of termination on very short notice were given.

In sum, the files confirm my personal knowledge that WSA interim chartering had demonstrated that the rates under those charters were too low if the American pre-war owners and post-war prospective purchasers were to be protected from freight undercutting by charterers contrary to the policies of the 1946 Act to foster a *privately-owned* American merchant marine. The files also make clear the early assumption by all of us who were concerned, that charters under the 1946 Act would be long-term charters.

10. The Acting Director, Division of Vessel Disposal and Government Aids, on May 20, 1946, proposed to the Commission a charter period of from one to five years "on the grounds that the one-year period would discourage speculative chartering, and that five years is the maximum which can justifiably be planned for."

11. A proposed draft of General Order 60, circulated on April 10, 1946, had contained a provision for a charter term of one year. But even that early it was proposed that such

a definite provision be eliminated because of the developing need for relief movements and for tiding over redeliveries of owned vessels. While the opinion was expressed that the legitimate charterer should not be unnecessarily handicapped, it was stated that:

> The charter policy to be adopted by the Commission should eliminate much speculative chartering and chartering in lieu of sales.

And the statement was made that some of the industry was counting on the world market rate provision for protection against such chartering.

12. On July 16, 1946, realizing that the rate of hire under temporary (i.e., less than one year) charters should be higher than under long-range charters, I addressed a written proposal to the Chairman of the Committee on Chartering Policy that, in the case of temporary charters, General Order 60 be amended to require additional charter hire of 66⅔ percent.

Three days later, on July 19, 1946, our committee addressed a memorandum to the Commission pointing out that the needs for UNRRA and relief cargo would far exceed available private tonnage, and that the machinery set up for chartering in General Order 60 was designed for long-term charters of a year or more only, and not for short-term charters which must be consummated on short notice.

On July 23, 1946, I addressed a separate memorandum to the Commission (which was presented to the Commission attached to the July 19 memorandum) recommending basic hire of 15 percent of the statutory sales price and 66⅔ percent of additional hire for temporary charters.

13. The Commission considered this matter on July 25, 1946, and indicated that, instead of the contract adding to the 50 percent statutory additional charter hire, under the temporary charters,

> • • • any change should be made in the base rate of charters which appear too low.

This decision of the Commission, however, was not predicated upon any belief that it lacked authority under section 5(b) to add increased amounts of profit sharing or "additional charter hire" to that required by section 709(a), and the committee was told to continue its deliberations on charter rates.

At 5:00 P.M. of the same day, our committee reported difficulties in deciding upon the proper rates. The Commission decided, therefore, to continue the WSA charters to September 1, 1946, when the Commission charters would begin "at rates to be fixed by the Commission."

In a memorandum of July 29, 1946, summarizing the actions taken on July 25, Commissioner Carmody states that, while profit sharing or additional hire of 66⅔ percent had been disapproved, there was a "common recognition that basic bareboat charter rate was too low," and the Commission requested a definite committee recommendation of base rates that "would be more nearly in line with the world charter rates * * *."

14. Finally, on July 29, 1946, just two days before our first chartering committee was to be dissolved, it processed a memorandum to the Commission requesting an opportunity to argue orally in favor of a rate of 15 percent of the unadjusted statutory sales price or the floor, as fixed or firm hire, plus contractual profit sharing or additional charter hire of 66⅔ percent of net profits adjusted, as giving

> * * * the maximum effectiveness in its program of transition from Government to private operation with the maximum recovery of hire consistent therewith.

Our memorandum stated that the method proposed must, of course, be approved by the General Counsel as consistent with the provisions of law.

Our first committee attached to that memorandum a separate memorandum of the same date in which it reported that, after the committee had "studied the world charter market," it adopted the proposal for rates of hire

based on 15 percent of the higher of the unadjusted statutory sales price or floor for the domestic trades, and firm rates including 21.7 percent for Liberties, and 17.3 percent for C-B's for foreign trade, which rates were considerably above the WSA basic rate.

15. While both our memorandums of July 29, 1946 were presented to the Commission, the one recommending 66⅔ percent additional hire was designated a revision of the other. And the Commission minutes of July 31, 1946 show that, in discussion, the committee chairman stated that the committee favored fixed or firm hire of 15 percent, plus profit sharing or additional hire of "66⅔ percent of the net profits adjusted."

The memorandum suggesting 21.7 percent for Liberties was submitted because the Commission, on July 25, 1946, had ordered the committee to develop a high firm rate of hire, instead of profit sharing additional hire in addition to the 50 percent required by statute. But the committee, knowing the difficulties implicit in such a determination, considered an increase in the profit sharing or additional hire to be the fairer method because, coming out of any profits, it involved less risk to the charterers and was more adaptable to the fluctuations of world market rates.

16. The most significant aspect of the July 31, 1946 meeting of the Commission was that it was thereat that a "sliding scale" of contractual profit sharing or additional charter hire, in addition to that required by statute, was first formally proposed to the Commission. The minutes show that committee member Dudley B. Donald, then Acting Chief of the Chartering Section, and in charge of both WSA and Commission chartering activities, proposed the same fixed or base hire as that in the July 29 memorandum, with the statutory additional hire of 50 percent and recapture of profits after "a limitation of $200 per day profit, with an increased percentage based on amounts above that figure."

17. On August 1, 1946, a new Special Charter Committee was appointed to further study and report on the whole problem of charters. While there were several new mem-

bers, including General Counsel Wade H. Skinner, both Mr. Donald and I, among others, were reappointed. The chairman of the committee, Mr. R. S. McKeough, was also a member of the Commission.

As above indicated, our prior committee had been studying the world market rate. Data were collected to be used in relating world market time charter rates to bareboat rates, the former including operating costs. Statements were compiled by or for committee members, giving the estimated daily operating costs of various types of vessels. Tables were compiled of the statutory sales prices of the several types as compared with the 15 percent in the WSA charter.

18. About August 1, 1946 our committee considered as possibilities rates similar to the Donald proposal at the July 31 Commission meeting. Consideration was given to a fixed or basic hire of 15 percent plus 50 percent statutory additional charter hire (as provided in section 709(a)).

> * * * provided that should the overall profits after "basic" and "additional charter hire" exceed 20% per annum on capital necessarily employed in the business, said excess profits shall be paid to the Commission as further additional charter hire.

Separate drafts of two other variations of the same general method of computing the total contractual hire were also considered about August 2, namely, 15 percent firm or basic and 50 percent statutory additional hire:

> (1) provided that, in the event the total profits accruing to the owner, after "basic" and "additional" hire exceed 20% per annum of the capital necessarily employed in the business, 80% of said excess profits shall be paid to the Maritime Commission.
>
> or
>
> (2) provided that the charterer's overall profit, if any (after payment of "basic" and "additional" charter hire), in excess of 20% of capital necessarily employed

in the business, as determined by the Commission, shall be paid to the Maritime Commission.

Additionally, pencilled notes of committee members show calculations of additional hire at various sliding scales which were considered, and that the several methods were being presented to the General Counsel for his consideration of their legality in the light of the provisions of section 5 of the 1946 Act and section 709 of the 1936 Act.

19. A conference was held by our special committee about August 5, 1946 with various representatives of the American shipping industry, at which time the question of appropriate rates of hire was discussed. Notes of that conference show that the representative of United States Lines stated the WSA chartering had resulted in unanticipated excessive profits and that charter rates must be increased in order to foster sales. An official of Waterman Steamship Company pointed out the need for using the world market rates.

A note in the files by one committee member states that the proposal to increase the hire

> • • • is based on the premise of making the charter operations the least attractive and private ownership the better proposition.

In sum, there is no slightest doubt that all members of our committee realized fully at all times that the WSA rate of hire was too low and that there had to be an increase. They realized also, as was urged by the industry, that the 1946 Act required chartering to be on a basis which would foster vessel ownership and stimulate sales, and that this also required use of the world market rate. The committee did not consider it entirely clear whether the 1946 Act expressly prohibited the use of a 15 percent rate, mentioned in section 5(b), if the world market rate was, say 30 percent. It was reasoned, however, that the Commission would in any event be precluded from ever using the 15 percent rate when the

world market rate was, say, 30 percent, because of the requirement in section 5(b) that the total contractual rate of hire be "consistent with the policies of this [1946] Act," it being clearly inconsistent with the fostering of vessel ownership and the promotion of vessel sales to charter at a rate so low as to depress a higher world market and thus to cause owners to suffer and prospective owners to be deterred from buying, but enabling charterers to undercut the going rate.

20. The disagreement in the committee was over the *method* of effecting increased total contractual hire—whether it was preferable to have higher firm or basic hire, which imposed much greater risks of loss on the charterers, or whether it was fairer to lessen the risk by a smaller rate of high firm hire and a greater split of the excess profits. Our committee files leave no doubt that, in effectuating the policies of the 1946 Act, the firm-hire would have been set considerably higher if amounts of contractual profit sharing or "additional hire" had not been added to the 50 percent required by statute.

21. On August 8, 1946, four members of our Special Charter Committee (one not reporting) made their report to the Commission recommending, after intensive study of the world market situation and the reaction of the industry, a firm or basic hire of 15 percent of the higher of the unadjusted statutory sales price or the floor, and a total profit sharing or additional charter hire of 90 percent of net voyage profits in excess of 10 percent of capital necessarily employed. The period was to be six months, with the right to 15-day cancellation by either party. The report and recommendation were signed by four members, including General Counsel Skinner, Commissioner McKeough and myself. It reported interviewing a cross section of the charterers involved. Regarding world market rates, the memorandum stated:

> The freight rates are high, very much higher than before the War.

It further stated:

> Generally, the basic charter rate of 15% of the sales price is below the world market charter rate and, therefore, is not consistent with the policies of the Merchant Ship Sales Act, 1946.

With the exception of one member, the committee believed it

> * * * would not be practicable at this stage of interim chartering to increase basic rates to what would appear to be the world market rates. As interim chartering has arisen from an emergency condition, we believe that the most practical way, under the circumstances, to achieve our major objective (more equitable charter hire and to reduce excessive charter profits to the charterer) would be to increase the present 50-50 division of the profits over 10% per annum of the capital necessarily employed in the business * * *

All committee members except one were reported as agreeing that the statutory 50 percent of profit sharing should be added to, with a minority favoring a total of less than 90 percent. The majority believed that redeliveries from such increased hire would be absorbed by increased sales, and by other charterers, berth operators and general agents.

22. Acting Chief Dudley B. Donald, Charter Section, by a separate memorandum of August 7, 1946, concurred in by C. G. Cornwell, recommended the same period, cancellation notice, and "initial" basic hire as the majority, but recommended additional profit sharing hire consisting of:

> (a) 50 percent of net voyage profit up to the first $200 per day above 10 percent of capital necessarily employed, and
>
> (b) 90 percent of the excess over such $200 net voyage profit per day.

23. A third memorandum, dated August 6, 1946, stated the dissent of committee member Paul A. Sullivan, of the Operations Branch. He favored raising the firm hire rather than adding more profit sharing or additional hire. It was his position that section 5(b) permitted only a firm contractual rate of hire. "The Commission had first to fix the charter hire at such rate as the Commission determines to be consistent with the policies of the Act and then in Subsection (c) specifically provides that Section 709, 1936 Act shall apply." Mr. Sullivan, who was also not a lawyer, reasoned that, under the policy of the Act for private ownership, compliance with which is required by section 5(b), the firm hire should be set at a rate which gives the charterer no advantage over an owner, and

> it seems that the rates should conform to the prevailing world market charter rates adjusted to meet the special conditions of the Maritime Commission * * *.

He criticized the 90 percent profit sharing or additional hire proposed by four committee members, stating that it

> * * * may result in the payment of full charter hire less than the prevailing world market rates.

He set forth a formula for adjusting the prevailing world market time charter rates to produce basic bareboat rates thus:

World market T/c rates—Liberty	$4.50 d.w.t. mo.
Owner's expense	2.10
Comparable bareboat rate	2.40
Three-fourths of world market bareboat rate	1.40

His recommendation was for firm basic hire of $1.80 d.w.t. mo., or a rate equal to three-fourths of the world market bareboat rate. [$1.80 d.w.t. mo. is the equivalent of 34.2 percent, as compared with 15 percent (74¢ d.w.t. mo.) of the unadjusted statutory sales price or the floor price, and $2.40 is the equivalent of 45.6 percent.]

He favored the six-month term, but strongly advocated elimination of the 15-day termination right except by the Government in case of sale or default.

> The delay and expense involved in the taking of inventories and surveys at the end of each voyage which could happen with the option of termination on 15 days' notice in my opinion is not warranted.

24. My committee files contain my "Comments on Mr. Sullivan's Proposal-Interim Chartering." I stated that Mr. Sullivan seemed to contemplate that the one-fourth of the estimated world market rate would be offset by the 50 percent additional charter hire "which is an assumption and highly speculative." I added:

> If Mr. Sullivan's theory to the effect that the law requires the Commission to charge the world market rate is right, then he has violated his own theory by charging only 75% thereof, because the specific provision in the law that mentions world market values is by no stretch of the imagination tied to the additional charter hire provision which is in another subsection of the law.

Even taking Mr. Sullivan's assumption of 30 cents additional hire, I stated that the total hire, including additional hire, would be $1.80 plus .30, or $2.10, and would fail to produce the world market rate of $2.40. I concluded my comments thus:

> In brief, his proposal does not even attempt to establish world market rates for the basic charter hire. In other words, he does not remove our one deficiency, that is, our failure to use world market rates as our basic charter rates, and, at the same time, he would leave us with the tremendous task of fixing new basic rates on every charter without the time or facilities adequate to do the job.

It should be noted that Mr. Sullivan did not view an addition to the statutory 50 percent additional hire as a viola-

tion of section 709(a) except insofar as such increase might still fail to result in collection of the world market rate.

25. The foregoing memorandums were thoroughly considered by the Commission at its meeting on August 9, 1946, at which the General Counsel and affiant, among others, were present. Everyone was in accord that the 15 percent firm hire had to be substantially increased, but there was a variety of views as to the method of effecting the increase in total hire.

Commissioner McKeough pointed out that the Committee was endeavoring.

> • • • to correct a situation where charterers with a low capital investment would earn exceptionally high profits.

The Commission Chairman was opposed to 90 percent additional hire as imposing too great risks on the charters. Commissioner Parkhurst suggested a compromise between the proposed 66⅔ percent and 90 percent total additional hire.

Committee member Darr, who had filed no report, proposed, with the concurrence of Messrs. Sullivan and Cornwell, a compromise between the majority and minority reports as follows:

50% ..... first $150 per day.
75% ..... next $150 per day.
90% ..... excess over such $300 per day.

Commissioner McKeough offered for the majority the following compromise:

50% ..... first $150 per day.
90% ..... excess over $150 per day.

Commissioner Mellen then proposed:

50% ..... up to first $100 per day.
75% ..... next $200 per day.
90% ..... excess over such $300 per day.

The Commission thereupon approved the majority report of August 8, 1946, with the last mentioned modifications proposed by Commissioner Mellen. This is the sliding scale, consisting of contractual additions to the statutory 50 percent additional charter hire of which Eastern Gas complains.

26. By telegram of August 12, 1946, the industry was notified of such action, including the sliding scale of additional hire. And opportunity was given to the industry to be heard on the above.

The Subcommittee of the Committee of Whole (representing the American Merchant Marine Institute, Inc., the Association of American Shipowners, the Pacific Steamship Association and the Shipowners Association of the Pacific Coast) proposed that (1) 50 percent additional hire should apply to chartered vessels in a number equal to the number of 1946 Act purchase applications made, "with such guarantees as the Commission may deem advisable," and (2) progressive reduction in chartered vessels with 50 percent additional charter hire as each owned vessel is supplied.

My memorandum of August 21, 1946, for the committee files, commented upon that proposal. I therein stated:

> [that the members of the subcommittee point out that the law provides for 50 per cent additional hire but] fail to emphasize the fact that the law also implies, at least, that the *basic charter* hire *shall* be equal to the world market rate. It was generally conceded in the Special Committee's deliberations that the bareboat world market rate, generally speaking, was at least twice the basic rate of 15% of statutory sales price.
>
> . . . . .
>
> Therefore, if the owner is going to ask for the minimum recapture of 50% of profits in excess of 10% of capital necessarily employed; *then it would seem that the Commission should by all means increase the basic charter rate to the recognized world market bareboat rate.* The

> charterer is in better position on a low basic charter [hire] and a high recapture [additional hire] than he would be if the position were reversed because in the first instance a more liberal portion of the overall charter hire is payable out of profits, if earned, whereas, in the second instance, a much greater charter hire would be paid whether there were *any* profits or not. [Emphasis in original memorandum.]

I concluded my comments with the statement that it would not be "equitable or in the public interest" to make the changes proposed.

27. On August 23, 1946, the Commission denied the position of the Committee of the Whole. Meanwhile, Mr. Donald, as Acting Chief, Chartering Section, made a report and detailed recommendation as to various charter matters, in which he stated that:

> Practically all bareboat charterers [60 in number] have accepted the conditions of the Maritime Commission form of charter *outlined* in the MC-WSA telegram sent to them on August 12. Although some have protested, no charterer has refused to accept the recapture provisions for additional charter hire [sliding scale].

And on September 4, 1946, the Commission approved the Form 303 charter. At no time prior or subsequent thereto did the General Counsel or any other member of the staff question the legality of such charter or the legality of Clause 13 thereof which called for a sliding scale of additional charter hire composed of the statutory amount of 50 percent plus contractual additions if profits were exorbitant.

28. On numerous occasions thereafter commencing on October 15, 1946, Maritime reported fully to Congress in its quarterly and annual reports, as required by section 13 of the 1946 Act, on both the terms and effect of the sliding scale provisions for profit sharing or additional charter hire contained in Clause 13 of the charter, detailing the percentages in the sliding scale and how it was applied.

Thereafter, in early 1947, the Committee on Chartering Policy again reviewed the charter rates, recommending to the Commission that short term charters be concluded and that charters be made for a minimum of 13 months, with a firm basic charter hire of 25 percent (in lieu of the 15 percent in the Form 303 charter), and with additional charter hire at the statutory 50 percent (in lieu of the sliding scale contained in the Form 303 charter). This recommendation was made to the Commission solely because it was felt that the Form 303 charter was not discouraging chartering and encouraging sales, as required by the policy of the Act, and not because there was then or at any later time any question as to the legality of adding additional contractual amounts of profit sharing to the statutory 50 percent so as to form a sliding scale.

29. Numerous objections to this plan for higher firm hire were received from the industry, including those members then possessing and operating vessels under the Form 303 charter. For example, the St. Lawrence Navigation Company, Inc., by a telegram of April 7, 1947, stated that it was prepared to apply for a Form 303 charter (with sliding scale), but would not change to the proposed long-range charter because it

> • • • greatly increases charterer's risk. At the same time protection of ship cancellation is removed.

The American Tramp Shipowners opposed the proposed program and concluded it best for the Commission to continue the Form 303 charter. Similarly, Ship Operators Association, Inc. felt that it was not an opportune moment to negotiate a long-range charter program, and recommended that the present charters (Form 303 with sliding scale) continue. Other charterers expressed a similar desire that no change in the chartering program be effected at that time.

After considering all of the industry objections to a change, the Commission decided against such change for the time being at its April 17, 1947 meeting.

30. In its report to Congress for the quarter ending June 30, 1947, the Commission again reported in full detail on the sliding scale provisions for amounts of profit sharing or additional charter hire in addition to the statutory 50 percent. It reported also that action on its proposal for 25 percent basic and 50 percent statutory additional hire and a minimum period of 13 months had been deferred in view of "the many objections raised against the proposed change" and the uncertain conditions of world shipping.

In April, May and June 1947, extensive congressional hearings were held by the Weichel House Subcommittee (726 pp.) on the question of extending the 1946 Act authorities, including the authority to charter. The Commission Chairman (p. 170) explained that the Form 303 charter provided for additional hire covering "most of the profits," and, in response to a direct question from the subcommittee chairman, fully detailed (pp. 176-177) the 50-75-90 percent sliding scale of additional hire in the charter.

It was during these hearings that Congressmen Keogh and Bonner, in questioning Commissioner Mellen, brought out that charterers were not paying the world market rate of charter hire which the Commission was required to charge by the 1946 Act. Testimony for the industry fully acquainted the subcommittee with the nature of the contractual additions to the statutory 50 percent profit sharing resulting from the sliding scale provisions of the Form 303 charter and with the financial results of their operations thereunder. At no time during the hearings did any of the subcommittee members or the witnesses argue that such sliding scale of additions to the 50 percent statutory amount was illegal.

Indeed, S. Rep. No. 392, 80th Cong., 1st Sess. (June 26, 1947), and H.R. Rep. No. 725, 80th Cong., 1st Sess. (June 27, 1947) reluctantly granted an extension of the Commission's chartering authority because it was believed that continuance thereof had

> • • • militated against the accomplishment of the objectives of the [1946] Act of selling war-built merchant

ships and of building for the future a privately operated American merchant marine.

The reports both state:

> • • • this extension has been granted with the understanding that the basic rates for the charter of dry-cargo vessels and recapture [additional hire] rates will be immediately increased, thus encouraging the purchase rather than charter of these ships.

Public Law 127, 80th Cong., approved the day following issuance of these two congressional reports, extended the Commission's chartering authority from December 31, 1947 (the original termination date) to March 1, 1948.

31. On July 10, 1947, following issuance of the congressional reports directing an increase both in the basic rates and in the contractual sliding scale of additional charter hire, Commissioner Mellen proposed increasing the basic rate to 25 percent with 50 percent additional hire. That suggestion was repeated at the July 15, 1947, Commission meeting. The next day (July 16, 1947) the New York Journal of Commerce (p. 24, vol. 3) reported that discussion in an article by Oscar E. Naumann, which also stated that the cancellation clause would be eliminated and the term would be August 1, 1947, to February 1, 1948. Commissioners were reported as stating that the increase in basic hire from 15 to 25 percent should be offset by the reduction in additional hire, and should make for greater efficiency. The article then concluded that *the increase in basic rates "jibes" with the recommendations in the House Committee reports, but the committee also stated that "recapture [additional hire] rates will be immediately increased."* [Emphasis supplied.]

The same day, Isbrandtsen Company, Inc., wrote, commenting on the article to the effect that favorable employment of ships had been a "foregone conclusion" in the past periods but that the then-existing world market did not favor a tightening of terms.

The Commission's 1947 Annual Report to Congress for fiscal year ending June 30, 1947, noted the increase from 471 under the WSA charter on June 30, 1946, and 734 on August 31, 1946 (when the Form 303 charter began), to 1,510 on June 30, 1947. It stated that most of the 1,510 vessels under charter on June 30, 1947, were carrying relief cargo. *The report set forth in detail the provisions of the 50-75-90 percent sliding scale of additional hire in the charters,* and stated that new charters proposed at higher basic hire and 50 percent additional hire had been proposed.

32. Overtonnage of the market then began to be seriously felt. On July 18, 1947, the American Tramp Shipowners Institute opposed any charter hire increase because of a serious decline in available cargoes and resulting freight drop to a point where operations were not profitable.

Four days later (July 22, 1947), Marine Transport Lines, Inc. telegraphed that it had planned to purchase ten ships of which only four had been acquired to date. It stated:

> View demoralized condition freight market due to overtonnaging under bareboat charters, find it necessary defer further purchases dry cargo ships indefinitely. Under present situation privately owned American ships unable secure cargoes while some bareboat chartered vessels are taking cargoes at definite losses. Consider imperative that immediate steps be taken by Commission to prevent further deliveries under bareboat charter and that existing bareboat chartered fleet be reduced twenty-five percent by Commission promptly withdrawing such percentage from each charterer.

On July 30, 1947, Marine Transport was advised by letter that all district directors were instructed on July 23 to make no further deliveries of vessels allocated for charter *except for berth service* to meet prior commitments at not less than break-even rates, and that allocations for charter had been stopped. The Commission was reported to be

actively considering corrective measures to relieve the situation.

On July 23, 1947, the Ship Operators Association, Inc., telegraphed that it viewed with alarm:

> • • • current demoralized freight conditions • • • brought about by keen and destructive competition between bareboat charterers at a time when insufficient employment for the American bareboat fleet exists.

The telegram stated that the situation was urgent because of idleness or operation at less than cost.

At the July 24, 1947, Commission meeting, it was considered whether too many vessels were under charter and whether there should not be a ceiling on the number.

On July 24, 1947, the National Federation of American Shipping, Inc. (of which the American Merchant Marine Institute, to which Eastern Gas belonged, was a member) wrote that there were:

> • • • disturbed conditions in the charter market due to overtonnage.

The letter urged that chartering:

> • • • should be reduced to the very minimum until this situation can be thoroughly analyzed and a definite forward policy adopted.

On July 25, 1947, the Association of American Ship Owners recommended ceasing deliveries, even though fixtures were available at break-even rates, because additional tonnage was not needed. It also recommended reports of activities as brokers or agents for foreigners.

On July 29, 1947, the Commission modified its field instructions to the effect that—

(1) Deliveries would be made for bulk trade only if rates not less than break-even or essential to protect the charterer.

(2) Deliveries for berth operation would be made only

if the operator guaranteed it would not withdraw its owned vessels from berth for bulk operation.

(3) Deliveries to berth operators for bulk service would be made only where there was a prior commitment at not less than break-even rates.

(4) No deliveries for future commitments nor allocations for charter would be made at the time.

By letter of July 30, 1947, States Marine Corporation, which held April 22, 1947, A.T.I.C. subcharters for 15 vessels for one year from tender at *50 cents* under the WSA published rate, as compared with the current rate of $4.90 under the WSA rate, requested protection of its subcharters, stating that the earnings would be about $550 per day.

On July 31, 1947, the Association of American Ship Owners telegraphed that the overtonnage of the foreign trades would be disastrous if not checked, as sales were being discouraged if not altogether halted, and ownership seriously jeopardized. To encourage private ownership, it vigorously urged sufficient withdrawals of chartered vessels to effect a balance between space and cargoes and

> • • • to establish a relationship between the chartered tonnage of the several charterers and the tonnage *owned* by them either currently or as of September 3, 1939, whichever such owned tonnage may be greater. [Emphasis supplied.]

On July 31, 1947, William Radner, Esq., representing a charterer in the domestic trade, transmitted to the Assistant General Counsel (and later, to the Commission) a memorandum in which he stated that:

> • • • Congress prescribed the world market standard as the floor below which rates could not be allowed to drop under Section 5(b) • • •.

He further stated that world market rates should be fixed on the basis of adjusted time charter rates. The test under the statute, he said, was:

> • • • to establish what a prospective charterer, ready, willing and able to charter, would be willing to pay to an owner who desires to charter in an operation "similar" to that contemplated • • •.

The world market rate proviso, according to him, was intended:

> • • • to insure that the government receives full value for the use of the vessel, not on the basis of maximum use in the most profitable trade, but rather on the basis of the particular use to which the vessel is required to be devoted or one similar thereto. The government is to secure full value but not excessive compensation. The purpose of the world market provision was to make certain that the United States would secure the full value of the use of its vessels.

That there is no world market, he said, "may enlarge but does not restrict the Commission's discretion."

> Thus, the world market proviso merely means that the Commission in fixing just compensation for the use of its vessels should use *the highest prevailing market in the world* for such use or similar use. [Emphasis supplied.]

As to the discretion of the Commission in respect of setting charter hire under section 5(b) of the 1946 Act, Mr. Radner quoted Chairman Weichel of the House Merchant Marine Committee as saying:

> • • • with reference to anything which is responsibility they [the Commission] want a legislative act so they don't have to exercise their discretion. • • • You are asking for legislation all the time in place of using discretion. I understand that. I want to know why they don't try to do something as members of the Commission.

Mr. Radner also quoted from the House and Senate reports as follows in respect of the basic policy of the act:

H.R. No. 1526, page 14; Senate Report; and Conference Report:

> * * * the discretion placed in the Commission by this section as to charters will be governed by the declaration of policy and other provisions of the bill.

Senate Report No. 807, 79th Congress, page 6, et seq:

> The objective of the measure [Ship Sales Bill] is, of course, the transfer of Government-owned tonnage to private ownership for operation in both foreign and domestic trades.

33. At the Commission meeting of August 8, 1947, the President of the National Federation of American Shipping, Inc., of which American Merchant Marine Institute, to which Eastern Gas belonged, was a member, opposed any more charters because the market was definitely overcrowded. He was of the opinion there should be a weighted average in favor of ship owners and that there should be no charters to those acting as agents for foreigners. He mentioned several possible methods of reducing the outstanding charter tonnage including "economic controls involving *split accounting periods* and controlled redeliveries." [Emphasis supplied.]

Thereupon, the Commission decided that no more vessels would be chartered (except for domestic and berth trades) in order to reduce the number of chartered vessels, the necessity for which was evidenced by freight rates below operating costs. Various methods of modifying the charters were considered, including elimination of right to cancel, higher basic hire and split accountings.

On August 14, 1947, the Commission decided that all 78 charterers would be notified that the charters would be canceled on 15 days' notice, effective September 1, 1947, but that new charter terms would be submitted prior thereto. The telegrams were sent next day to all charterers including the cross-respondent.

On August 18, 1947, American Foreign Steamship Corporation and Wessel Duval & Co., Inc., telegraphed requesting modification of the August 15 termination telegram so that it would not be effective if the new terms were accepted. Like States Marine Corporation in its July 30, 1947, letter, those two companies also wanted the old Form 303 charter to continue so as, *inter alia*, to *prevent the termination of existing subcharters for numerous consecutive voyages at good compensatory rates*, such as the aforementioned favorable ATIC subcharters for one year.

Again, by letter of August 19, 1947, States Marine Corporation insisted on an amendment of the Form 303 charter which would contain any modification, *inter alia*, to eliminate possible resulting termination of:

> • • • subcharters presently committed for numerous consecutive voyages at good compensatory rates • • •. • • • there is a strong possibility that consecutive voyage charters may be cancelled by the charterers because of the fact that the freight rates involved are considerably higher than current market rates.

The same day, August 19, 1947, the Ship Operators Association, Inc., telegraphed, urging withdrawal of the termination notice [which would continue the sliding scale provision] or postponement of action in view of the then freight market conditions.

At its meeting on August 19, 1947, the Commission gave consideration to cutting down the overtonnage by limiting charters to those who were ship owners on a ratio basis. Commissioner Mellen expressed the view that—

> easy chartering will discourage owners and others from buying ships,

and he recommended that the charter terms be such

> as may be necessary to safeguard present and potential ship owners and yet permit the economical movement of such cargoes.

He favored a charter hire increase. Separate accounting as a method of inducing redeliveries was discussed, with the right to obtain vessels in the future being subject to additional burdens. The Commission gave consideration to the fact that:

> Merchant Ship Sales Act of 1946 is primarily a sales act and not a chartering act.

34. On August 20, 1947, the Commission voted 3 to 2 not to increase the Form 303 fixed, basic hire. Commissioner Parkhurst stated that, if the basic hire was not raised, he favored additional hire of not lower than 75 percent (instead of starting at 50 percent as was the case under the sliding scale). Mr. Mellen favored an increase in the basic hire and a change in the sliding scale, in order to stimulate the profit motive. A telegram of August 20, 1947 was approved and sent to all charterers, including Eastern Gas. It referred to the August 15 termination telegram, and proposed an addendum for about six months, effective September 1, 1947, with *no change in the basic and additional hire* [sliding scale] in the charters then outstanding, right to terminate on 15 days' notice *after 60 days* from the date a vessel becomes subject to the addendum, *accounting cut-off* with voyages begun after September 1, 1947, the right to establish reserves for repairs and insurance, and future allocations to be subject to additional redelivery obligations. Acceptance was to be by August 27, 1947, in lieu of which the vessels were to be redelivered in accordance with the August 15 telegram.

35. By telegram of August 25, 1947, Eastern Gas accepted the addendum proposed in the August 20 telegram as to any vessels then under charter, which included acceptance of the sliding scale for the period of the extension, under the stiffened terms of the addendum. On August 27, 1947, pursuant to Commission action, all charterers, including Eastern Gas, were advised that their acceptance of the Foreign Trade Addendum might cover all or any lesser number of vessels under charter, and that, with

respect to those as to which the addendum was not accepted, the August 15 termination notice was to stand, whereas the termination notice was to be considered withdrawn as to vessels included in the acceptance. The formal Foreign Trade Addendums were transmitted to Eastern Gas and subsequently returned, executed, without any objection.

36. In its report to Congress for the quarter ending September 30, 1947, the Commission reported that, at the beginning of the quarter, 1,486 vessels were under charter under the 1946 Act, but that redelivery notices had reduced the number to 1,313 by the end of the quarter. The Report states that a sharp downward turn in the freight market developed shortly after the beginning of the quarter

> due primarily to the reduction in export coal and grain shipments and also the curtailment of UNRRA programs. Freight rates dropped, in some cases as much as 33⅓ percent below those of March 1947, and chartered vessels began to be laid up for lack of cargo.

In explaining the Foreign Trade Addendum to Congress, the Commission explained that, in considering the change in its chartering program, it

> • • • gave full consideration to the view expressed in Senate Report No. 392 submitted to Congress June 26, 1946, by the Senate Committee on Interstate and Foreign Commerce with respect to an increase in the rate of basic hire and recapture [additional hire] rates.

The report explained that there was no change in the basic hire or the sliding scale provision, as such, under the Foreign Trade Addendum, but set forth fully the accounting cut off as of September 1, 1947, in applying the sliding scale, and stated:

> This action was designed to require the charterer to carry on all operations after August 31, 1947, without offsetting future losses against additional charter hire [sliding scale] due the Government from voyage profits of the prior period.

Aggregate redeliveries, according to that report, were 145 vessels, which Commission files show were made by 29 charterers. That report, however, did not reflect the full effect of the August 15 and 20 telegrams. Commission files reveal 172 redeliveries as a result thereof. The redeliveries were mostly Libertys, all except 9 of which were in the foreign trade. Prior to the redeliveries, 1,408 vessels were under charter to 78 charterers.

None of the 74 unqualified acceptances of the Foreign Trade Addendum, extending the sliding scale for *about* six months, suggested any question as to its validity. Pope & Talbot, Inc. (August 26, 1947, letter) expressed appreciation for the Commission's prompt action taken to remedy the offshore charter situation. Several not only accepted the addendum but applied for additional vessels. Marine Transport Lines, Inc. (August 27, 1947, letter) cancelled substantially 25 percent as being what it believed each charterer should withdraw

> * * * in order to encourage vessel disposals under Ship Sales Act, and to bring about stability in current charter market.

Isbrandtsen Co., Inc., telegraphed on August 27, 1947, that it appreciated

> * * * the many currents and crosscurrents in foreign commerce today * * * which we take it have been a factor in present shift of policy.

Isthmian Steamship Company telegraphed on August 27, 1947, that it understood

> * * * that primary purpose of your program is to have ships turned back to Government.

On August 29, 1947, the American Mail Line stated it still did not believe that all due regard had been given to a long-range program.

On September 23, 1947, the General Manager transmitted

a September 12 analysis by Arthur G. Syran, stating that the effect of the Foreign Trade Addendum was

> * * * compelling operators to fix their vessels in the open market at true compensatory rates.
>
> * * * * *
>
> If an operator was unable to fix his vessel at a profit he would take the prudent step of returning the vessel * * *, thereby reducing the available number in the open market. Thus the Commission action in changing the accounting period will tend to eliminate the excess number of vessels in the market and stabilize rates and at the same time permit ample ships to be available for the movement of the export coal and grain programs.

37. The report to Congress for the quarter ending December 31, 1947, stated that chartered vessels had been reduced to 1,101, including 52 under notice of redelivery, of which number 1,041 were for offshore services. A total of 212 had been redelivered during the quarter, 192 of which were after the right to terminate under the Foreign Trade Addendum became effective, indicating the reduced demand for tonnage. The report referred to the Foreign Trade Addendum as being

> * * * an effort to meet the changed conditions due to the decrease in available cargo for shipment to foreign ports.

38. On January 30, 1948, Senate Report 856 reported on S.J. Res. 173 for, *inter alia*, extension of authority to charter. It included a Commission report stating that 1,021 ships were chartered for the offshore trades as of January 15, 1948. The report was to the effect that privately owned tonnage was insufficient to move relief cargo, necessitating continuation of chartering. The Senate Report called specific attention to quarterly reports to Congress, and stated:

> Particular reference is made to the statement regarding the rate of basic hire and recapture [sliding scale] rates and the modified charter terms and conditions announced on August 20, 1947 [tightening the charter terms and retaining the sliding scale].

39. Congressional hearings were again held by the Weichel Committee in February 1948, at which time numerous members of the American shipping industry again complained of the fact that chartering under the 1946 Act was operating as a deterrent to the purchase of Government vessels. Again, both members of the Commission and of the industry explained in detail the nature and results of operations under the sliding scale of additional hire provided for in the Form 303 charter, and again no witness intimated the belief that such contractual additions to the 50 percent statutory amount was in any way illegal.

Public Law 423, 80th Cong., approved February 27, 1948, continued the Commission's chartering authority to March 1, 1949.

40. H.R. Rep. No. 60, 81st Cong., 1st Sess. (1949), approved a recommended four-month extension of chartering authority "with the understanding that the Commission will make no changes in its present procedures during that period." A similar direction to the Commission not to change its then present procedures was likewise contained in S. Rep. No. 55, 81st Cong., 1st Sess. (1949). The "present procedures" which were to remain unchanged included, of course, the sliding scale of contractual plus statutory additional charter hire with which Congress was by this time most thoroughly familiar.

Subsequently, H.R. Rep. No. 564, 81st Cong., 1st Sess. (1949) and S. Rep. No. 483, 81st Cong., 1st Sess. (1949) recommended extension of chartering authority for an additional year, but both reports stated:

> • • • it is contemplated that the Maritime Commission will continue to sell, charter and operate ships in accordance with existing procedures and without any change in its present policies.

Public Law 147, 81st Cong., approved June 29, 1949, subsequently extended the authority to charter to June 30, 1950. The effect of the congressional direction was to require the Commission to continue its then present use of the Form 303 charter, including, of course, the sliding scale provision in Clause 13.

41. I wish to reiterate most emphatically to the best of my knowledge and belief that at no time did any member of the Maritime Commission or its successor agencies, including members of its legal staff, question the legality of the inclusion of the so-called "sliding scale of additional charter hire" in Clause 13 of the Form 303 charter. I wish further to emphasize that the chartering committees of which I was a member at no time expressed doubts that Maritime was fully authorized by the terms of section 5(b) of the 1946 Act to fix charter rates in such manner as were felt to be consistent with the statutory policy of promoting sales and discouraging chartering. The only hesitancy as to the use of the sliding scale was that expressed by Mr. Sullivan, who was not a lawyer, but objected as described herein. And that hesitancy was generated solely by his belief that the proposed sliding scale provision might not result in charterers paying the world market charter rate which we felt to be compulsory under the statute.

/s/ CHARLIE H. MCDANIEL.

Subscribed and sworn to before me this 18th day of November, 1960.

/s/ HELEN S. DWYER,
Notary Public. [SEAL]

My commission expires November 14, 1964.

SUPPLEMENT TO RECORD ON APPEAL CERTIFIED ON AUGUST 9, 1962

[Affidavit of Benjamin F. Bouldin]

[Caption omitted]

AFFIDAVIT OF BENJAMIN F. BOULDIN

UNITED STATES OF AMERICA,
District of Columbia, ss:

BENJAMIN F. BOULDIN, being first duly sworn, deposes and says that:

1. I am a citizen of the United States, and a resident of Maryland, presently serving as an auditor with the Division of Audits, Office of the Comptroller, Maritime Administration, United States Department of Commerce. I am a qualified accountant and have been employed by this agency and its predecessor agencies since August of 1936 except for a two and one-half year period when I served with the Army Audit Division between June 1955 and January 1958, and a one-year period between September 1941 and September 1942 when I was in the armed forces. I make this affidavit to the best of my knowledge and belief based upon my use and examination of files of this agency and its predecessor agencies.

2. Under separate cover and marked Exhibits A through V are copies of the following pertinent documents on file with the Maritime Administration.

. . . . . .

3. On July 25, 1946, Eastern Gas submitted an offer to charter on warbuilt EC 2 (Liberty) collier in accordance with the Merchant Ship Sales Act (Public Law 321, 79th Cong., 2d Sess.), and the rules and regulations prescribed by the United States Maritime Commission. Eastern Gas' offer further stated that it agreed that any amendment or

modification of the rules and regulations were to be binding on all transactions approved by the Commission after the date of publication in the Federal Register (Exhibit C).

4. On August 12, 1946, the Maritime Commission sent a joint telegram (Exhibit D) to all interim charterers (Eastern Gas was not a charterer at this time). The charter hire terms fixed by the Commission for chartering under the 1946 Act were communicated to the interim charterers in paragraph 2 and 3 of the August 12 telegram, which advised that "basic" hire would be 15 percent per annum of either the unadjusted statutory sales price or the floor price of the vessels (whichever was higher), and that "additional charter hire" would be at a 50%-75%-90% sliding scale of sharing in the charterers' excessive profits. This was the same combination of statutory and contractual charter hire which the Commission decided on August 9, 1946, to be the charter hire rate appropriate for 1946 Act chartering.

5. Although the files of the Commission do not reflect whether the August 12, 1946 telegram was sent to Eastern Gas it appears that they did receive the telegram or had full knowledge of its contents since on September 20, 1946, Eastern Gas telegraphically accepted the Commission's offer to charter vessels on the terms contained in the August 12 telegram.

6. Thereafter, on September 10, 1946, the Commission published Supplement 5 to General Order 60 in the Federal Register (11 Fed. Reg. 9936). Supplement 5 (Exhibit B) contained the complete text of the "Form 303 SHIPSALES DEMISE" charter to be utilized in 1946 Act chartering, Part I setting forth the special provisions, and Part II the standard provisions.

7. The formal charter (Exhibit A) dated October 1, 1946, was tendered to Eastern Gas and was executed by it on November 7, 1946, and by the Commission on November 13, 1946.

8. A total of ten vessels were utilized by Eastern Gas under contract MCe-41881. The names of such vessels, their types, and dates of delivery and redelivery under the char-

ter and addenda are contained in Exhibit K hereto. There was also a simultaneous delivery and redelivery of eight of the vessels under the Foreign Trade Addendum (see paragraph 9, *infra*) to contract MCc 41811 (Addendum No. 7 to Exhibit A dated September 1, 1947) and the records of the Maritime Administration reflect that the simultaneous deliveries and redeliveries were as follows:

WILLIAM BEVAN 9/6/47; ISAAC SHARPLESS 9/8/47; WILLIAM MCKINLEY 9/8/47; WASHINGTON IRVING 9/9/47; GEORGE VANCOUVER 9/16/47; EMILY DICKINSON 9/16/47; ANDREW STEVENSON 9/21/47; JAMES BOWDOIN 10/4/47. The MERRIMAC SEAM and WILLIAM H. KENDRICK were redelivered prior to the execution of the Foreign Trade Addendum.

9. Following congressional hearings in the spring of 1947 with respect to extending the Commission's authority under the 1946 Act, S. Rep. No. 392, 80th Cong., 1st Sess., was issued on June 26, 1947, and H.R. Rep. No. 725, 80th Cong., 1st Sess., was issued on June 27, 1947. The committees issuing those reports were reluctant to extend the Commission's authority to charter, because they believed that chartering had

> militated against the accomplishment of the objectives of the [1946] Act of selling war-built merchant ships and of building for the future a privately operated American merchant marine.

Both committees recommended extension, however, but only

> with the understanding that the basic rates for the charter of dry-cargo vessels and recapture [the sliding scale of additional charter hire] rates will be immediately increased, thus encouraging the purchase rather than charter of these ships.

Public Law 127 (Act of June 28, 1947, 61 Stat. 190), approved the day following issuance of H.R. Rep. No. 725, extended the Commission's chartering authority (then due to expire on December 31, 1947) to March 1, 1948.

In an attempt to implement this congressional command

to immediately increase both basic and additional charter hire rates, the Commission considered raising "basic" charter hire from 15 to 25 percent of the vessels' unadjusted statutory sales price, and eliminating the contractual (75 percent and 90 percent) portion of the additional charter hire. However, strong industry opposition to this proposal was received by the Commission, a number of operators also complaining that too many government vessels were then under charter.

As a result of its consideration of these various factors, the Commission decided that no more vessels would be chartered for foreign service operation. And, on August 14, 1947, the Commission decided to cancel all charters as of September 1, 1947. A telegram to that effect (Exhibit 5) was sent to the charterers, including Eastern Gas, on August 15, 1947.

[NOTE: Clause C. (2) of the charters provided for a charter period of "about" six months, and Clause 14 permitted termination by either party on 15 days' notice. All of the vessels then under charter by Eastern Gas had either been utilized for at least six months or (in one case) would have been unable to commence and complete another voyage within the six months' period. The one exception was the WASHINGTON IRVING which had been under charter for only 3 months and 16 days.]

10. Since there was considerable opposition to a complete cessation of chartering, the Commission informed the charterers in its August 15 telegram that an opportunity to continue use of the vessels then under charter would be shortly offered on new terms and conditions to be announced.

Some of the charterers immediately requested the Commission to modify its August 15 notice of termination so that the termination of existing charters (which would cost them the loss of existing subcharters) would be effective only in case the charterers did not accept the new terms.

These various factors—congressional direction to increase rates, overtonnage of the charter market, and

requests of charterers that existing charters not be terminated so as to cost them the loss of remunerative subcharters—were considered by the Commission at meetings on August 19 and 20, 1947. After discussing various solutions, including the raising of rates, the Commission decided that the best solution to the problem was to offer the industry an addendum to existing charters, effective for six months from September 1, 1946, with no change in rates, with the right to terminate on 15 days' notice after 60 days' operation under the addendum, and with an "accounting cut-off" for voyages commencing after September 1, 1947.

[The concept of an "accounting cut-off" or "split accounting" had first been proposed as a solution to the Commission at its August 8, 1947 meeting by the President of the National Federation of American Shipping, Inc., of which the American Merchant Marine Institute, to which Eastern Gas belonged, was a member.]

As a result of this Commission decision, a telegram was sent to all charterers on August 20, 1947 (Exhibit T), offering them an addendum to their existing charters on the terms fixed at the Commission meeting of that date. As to those charterers not desiring to accept the new terms, the termination notice of August 15 was to remain effective. The charterers were directed to advise the Commission by August 27 if they desired to accept the proposed addendum. On August 25, 1947, Eastern Gas unconditionally accepted the proposed addendum (see Exhibit U), and on August 27, 1947, the Commission gave further details to Eastern Gas (Exhibit V).

11. As previously explained in paragraph 9 of this affidavit, both the House and Senate committees, in their June 1947 reports on the extension of chartering authority, had ordered the Commission to *increase* both basic hire and additional [sliding scale] charter hire. This put the Commission in a difficult position when the charter market began to fall by July 1947. The Commission explained how it had met the congressional directive in its report to Congress for the quarter ending September 30, 1947. It therein

stated that, after considering the views of the congressional committees, it did not increase either basic or additional charter hire because of the market slump, but, instead, required an accounting cut-off under the Foreign Trade Addendum, thereby inducing redeliveries and, at the same time, protecting the Government's additional charter hire earned prior to the Foreign Trade Addendum. Congress was fully and completely advised of the Foreign Trade Addendum both in reports and during hearings, and at no time did it object to the Commission's action.

12. The Foreign Trade Addendum to MCc 41881 (Addendum No. 7) was transmitted by the Commission to Eastern Gas on September 26, 1947.

13. Eastern Gas' Foreign Trade Addendum was sent to it for execution by a letter dated September 26, 1947, and was returned by letter of October 7, 1947, duly executed by it on October 3, 1947. Eastern Gas made no reservations, qualifications to the Foreign Trade Addendum. Maritime returned a fully-executed copy to Eastern Gas on October 14, 1947. On September 26, 1947, Maritime sent a letter to Eastern Gas requesting it to advise Maritime's district office upon the termination of the voyage in progress on August 21, 1947, so that change of status certificate under the Foreign Trade Addendum could be executed. Eastern Gas executed change of status certificates for each of the vessels covered by Exhibit A to Addendum No. 7 to Contract MCc 41881 (Exhibit A). Eastern Gas forwarded to Maritime its preliminary accountings covering voyages commencing after September 1, 1947, under the Foreign Trade Addendum (Addendum No. 7 to Exhibit A) by letters dated January 8, and February 4 and 27, 1948 (Exhibits L 11, L 12 and L 13). Eastern Gas thus clearly recognized the Foreign Trade Addendum and never raised any objection while it was filing its preliminary statements.

14. By a letter of instruction dated March 8, 1948, libelant was informed how to compute capital necessarily employed under the Foreign Trade Addendum. In a letter dated April 19, 1948, libelant was given notice that Clause 13 required a "complete settlement for additional charter

hire at the end of each calendar year or at the termination of the agreement, wherefore its statement for the end of the month in which the last voyage terminated under the original charter (operations outside of Addendum 7)" should be complete and accurate and the total additional charter hire shown to be due should be remitted. Eastern Gas replied, in a letter dated April 28, 1948, that it was impossible to give a "complete and accurate statement" of additional charter hire for voyages commenced prior to September 1, 1947, because of unsettled matters such as the pricing of inventory, latent defect claims, and claims of undue delays in accepting delivery. By a letter of August 6, 1948, Eastern Gas transmitted a check for $26,677 stating that it was "the balance due you for additional charter hire as reflected in statements rendered as of November 30, 1947." At this time no objection was made to the Foreign Trade Addendum or to the additional charter hire under Clause 13.

15. Supplement 21 to General Order 60 (15 Fed. Reg. 1789) was published on March 30, 1950, and gave full instructions as to the application of the Foreign Trade Addendum and restated and explained the Clause 13 requirements of cumulation of net voyage profits for each calendar year separately which Eastern Gas agreed to follow in its application to charter. In a letter dated April 4, 1950, Maritime sent libelant "Illustrative examples" of how to apply Supplement 21 to General Order 60 and specifically set forth the methods of calculating additional charter hire. Eastern Gas did not raise any objections to Supplement 21 or to the letter dated April 5, 1950. In a letter dated April 26, 1950 (Exhibit M) Eastern Gas undertook to itemize problems which would be encountered in rendering its final accountings. It listed nine items, and additional charter hire was not among them nor did it in any way allege that the Foreign Trade Addendum was illegal.

16. By a letter of August 7, 1951 (Exhibit N) Eastern Gas forwarded its "Final Accounting" applying the Foreign Trade Addendum and with certificates showing addi-

tional charter hire payable in the total amount of $181,418.05 ($454,580.05 less $273,162.00 prior payment) together with a check for $28,132.63. The Final Accounting had a certificate from Arthur Young & Co., Accountants, attached stating that it conformed to the charter and regulations and that it "fairly represented the proper determination of 'additional charter hire' accrued to the account of the Maritime Administration under such agreements for the period from November 1, 1946 to December 31, 1947." On August 30, 1951, Maritime returned Eastern Gas' check in the sum of $28,132.63 and requested a check for $180,482.38 additional charter hire. Eastern Gas replied on September 6, 1951, taking no exception or offering any revision to the $180,482.38 balance due. Upon review of the accountings Maritime discovered that the computation of additional charter hire under the 1947 offshore operations should have extended to 90 percent instead of only 75 percent as was done in the accountings. Maritime in a letter dated May 6, 1952 to Eastern Gas explained the adjustments in the accountings up to 90 percent additional charter hire.

17. By a letter of September 14, 1954, Eastern Gas transmitted to Maritime a supplementary final accounting. The supplementary final accounting not only showed no objection to the sliding scale of additional charter hire but in fact corrected its original "Final Accounting" to change the sliding scale of additional charter hire from 75 percent to 90 percent for the 1947 offshore operation prior to the Foreign Trade Addendum. Moreover, Eastern Gas did not take any exception to the Foreign Trade Addendum accounting cut-off.

18. Indeed, none of the accountings submitted by Eastern Gas during the period in which it operated vessels under the charter contained any intimation that Eastern Gas considered said charters to be illegal in any respect. It was not until February 15, 1955 (8 years and 10 months after redelivery of the last vessel) that Eastern Gas in any way challenged the legality of the charters.

21. Eastern Gas' memorandum (p. 13) alleges that the chartered vessels "were used preponderantly in carrying cargoes for the United States or its allies." A footnote on that page further alleges that such "Government" subcharters typically contained a quoted clause requiring the subcharterer to pay additional compensation for the use of the subchartered vessels in the event the Maritime Commission increased "basic hire" to more than fifteen per centum per annum of the estimated statutory sales price.

I do not agree with those unsworn statements of opposing counsel. Maritime regulations required filing with the Commission copies of all subcharters entered into by American Export. Of the 4 subcharters so filed by Eastern Gas with the Commission, only one was with the United States, or agencies thereof. And only that one filed with the Commission contained a clause requiring the subcharterer to pay additional compensation if the basic hire were increased by the Commission.

22. I have read and reviewed the affidavit of Robert A. Caswell attached to Eastern Gas' exceptions and exceptive allegations. The first sentence of paragraph 3 of the Caswell affidavit inaccurately and misleadingly states that the charters provided for the payment of additional charter hire "pursuant to section 709 of the Merchant Marine Act of 1936." No such provision was contained in the charter (see Exhibit A) and, as more completely explained in the affidavit of Charlie H. McDaniel, the additional charter hire stipulated in the charter was a combination of *statutory* profit sharing under section 709(a) and contractual profit sharing under section 5(b) of the 1946 Act.

23. Maritime was never advised until February 15, 1955 that Eastern Gas in anywise objected to the "sliding scale" and it was not until the libel was filed herein that Eastern Gas contended that the Foreign Trade Addendum was illegal. The Foreign Trade Addendum and cumulation issues were not raised by the industry groups and although the sliding scale was objected to by both tramp and owner groups, they themselves proposed modified sliding scales of additional charter hire above 50 percent. In any event,

when such attempts failed, Eastern Gas unqualifiedly accepted the sliding scale, gave bond to perform it, and operated under it with increased allocation of vessels for about a year. It waited over eight years before contending that the sliding scale was invalid.

/s/ BENJAMIN F. BOULDIN.

Subscribed and sworn to before me this 20th day of November, 1960.

/s/ MADELINE MACDONALD,
Notary Public. [SEAL.]

My Commission expires March 14, 1961.

VOLUME II: EXHIBIT A

[Contract No. MCe—41881]

Form No. 303 Contract No. MCe—41881
9/1/46

SHIPSALESDEMISE

UNITED STATES MARITIME COMMISSION
BAREBOAT CHARTER AGREEMENT OF
WAR-BUILT DRY-CARGO VESSEL

THIS AGREEMENT, dated as of October 1, 1946, between the UNITED STATES OF AMERICA, acting by and through the UNITED STATES MARITIME COMMISSION (hereinafter called the "OWNER") and EASTERN GAS AND FUEL ASSOCIATES (hereinafter called the "CHARTERER"), whose address is 250 Stuart Street, Boston 16, Massachusetts

WITNESSETH:

PART I

CLAUSE A. *Uniform Terms.* This Agreement consists of this Part I, and Part II published in the Federal Register of September 10, 1946, the provisions of said Part II being incorporated by reference as part of this Agreement.

Unless otherwise in this Part I expressly provided, all of the provisions of said Part II shall be a part of this Agreement as though fully set forth in this Part I. In the event of a conflict between the provisions of Parts I and II, the provisions of Part I shall govern to the extent of such conflict.

. . . . . .

CLAUSE C. (1) *Vessels Chartered and Other Details.* The Vessel or Vessels to which this Agreement relates, and the respective ports of delivery (if known) and applicable operating limits are as follows or as may be included hereunder by Addenda hereafter executed:

Name of Vessel	Type	Port of Delivery	Basic Hire, Per Calendar Month*	Valuation	Operating Limits as Specified in Clause:
MERRIMAC SEAM	EC2-S-AW1		$7,987.50	$639,000	D1(a)

* 15% per annum of either the unadjusted statutory sales price or the floor price of the vessel, whichever is higher.

. . . . . .

(2) *Period of Vessel's Use.* As to each Vessel a period of about six months from time of delivery to the Charterer pursuant to this Agreement, but subject to the provisions of Clause 14 of Part II; provided however that whenever the President shall proclaim that the security of the national defense makes it advisable, or during any national emergency declared by proclamation of the President, the Owner may terminate the Agreement without cost to the United States, upon such notice to the Charterer as the President shall determine.

. . . . . .

CLAUSE E. *Rate of Basic Charter Hire.* Unless otherwise specially agreed such rates as appear opposite the name of each Vessel listed in Clause C(1) and such addenda as may be executed.

. . . . . .

IN WITNESS WHEREOF, the Charterer has executed this Agreement in quadruplicate the 7th day of November, 1946, and the Owner has executed this Agreement in quadruplicate the 13th day of November 1946.

Execution for Charterer:

ATTEST:
C. RUSSELL WALTON,
Assistant Secretary
or if not incorporated
In the presence of:
——, ——,
Witness

EASTERN GAS AND FUEL ASSOCIATES
By: R. C. GOODWIN,
Vice President

Execution for Owner:
Approved as to form:
ARTHUR E. FERRIS,
Charter, Agency and Traffic Counsel
By: D. ECCLESTON

UNITED STATES OF AMERICA,
By: UNITED STATES MARITIME COMMISSION,
By: R. L. MCDONALD,
For the Commission.

PART II

CLAUSE 12. *Basic Charter Hire.* The Charterer shall pay to the Owner the basic charter hire at the monthly rate provided for in Part I hereof from the day and hour of delivery of the Vessels until and including the day and hour of redelivery to the Owner pursuant to the terms of this Agreement; or if any Vessel shall be lost, hire shall continue until the time of her loss, if known, or if the time of loss be uncertain then up to and including the time last heard from. Payment of such basic charter hire shall be made to the Owner at Washington, D. C., on delivery of the Vessel for the remainder of the calendar month in which delivery is made, and thereafter monthly in advance on the first day of each month.

CLAUSE 13. *Additional Charter Hire.* If at the end of

the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day.

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT charters) at such times and in such manner and amounts as may be required by the Owner; provided however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendi-

tion of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

CLAUSE 14. *Termination.* Either the Owner or the Charterer may terminate the period of use of any of the vessels by giving written notice to the other party at least fifteen (15) days prior to the termination of any voyage hereunder, in which event the vessel shall be redelivered at the port of redelivery provided for in Clause C of Part I hereof upon termination of the voyage during which such notice is given.

* * * * *

CLAUSE 21. *Bond.* The Charterer, at or before delivery of the first Vessel or Vessels under this Agreement, will furnish the owner with a bond with sufficient surety, in an amount of not less than $25,000 per Vessel for all Vessels chartered hereunder, such bond to be approved by the Owner, both as to form and sufficiency of the sureties, and to be conditioned upon the true and faithful performance of all and singular the covenants and agreements of the Charterer contained in this Agreement, including, but not limited to, the Charterer's obligation to pay charter hire and damages and to indemnify against liens. The Charterer may, in lieu of furnishing such bond, pledge United States Government securities in the face value of the required amount under an agreement satisfactory in form and substance to the Owner.

* * * * *

CLAUSE 24. *Events of Default.* The following shall constitute events of default under this Agreement:

(a) The failure of the Charterer to pay the charter hire on any Vessel as and when the same shall be due under the terms of this Agreement.

(b) The failure of the Charterer to operate any Vessel as required by Clause D of Part I or the Operation of any Vessel on some other route without the prior written approval of the Owner.

(c) Any material misrepresentation by the Charterer in connection with this Agreement whether before or after execution hereof and whether made in an application, report or otherwise, or any willful failure by the Charterer to disclose information necessary to cause any material representation by it not to be misleading.

• • • • •

(g) Any breach by the Charterer of its obligations under this Agreement or any agreement executed in connection therewith (including but not limited to any operating differential subsidy agreement with respect to the Vessels), or any ship mortgage given to or construction agreement made with the United States.

• • • • •

CLAUSE 27. *Cancellation or Modification by Mutual Consent: Waivers.* This Agreement may be terminated, modified, or amended at any time by mutual consent.

• • • • •

By Order of the United States Maritime Commission.

A. J. WILLIAMS,
Secretary.

September —, 1946.

Authority: Section 12(d) of the Merchant Ship Sales Act of 1946 (60 Stat. 41).

Contract No. MCc-41881
Addendum No. 1

ADDENDUM to BAREBOAT CHARTER (herein called the "Charter") dated as of October 1, 1946, between the UNITED STATES OF AMERICA, acting by and through the UNITED STATES MARITIME COMMISSION (hereinafter called the "Owner") and EASTERN GAS & FUEL ASSOCIATES (hereinafter called the "Charterer").

WHEREAS, the Owner and the Charterer have heretofore executed a Bareboat Charter (Contract MCc-41881, Shipsalesdemise, Form No. 303) covering certain vessels; and

WHEREAS, Clause C (1) of said charter contemplates the charter of additional vessels to be shown by addenda to be executed; and

WHEREAS, the Charterer has contracted for a certain additional vessel or vessels;

NOW, THEREFORE, in consideration of the premises, the parties hereto agree as follows:

Clause C (1) is amended by the addition of the following vessel or vessels and pertinent particulars:

Name of Vessel	Type	Port of Delivery	Basic Hire Per Calendar Month*	Valuation	Operating Limits as Specified in Clause:
EMILY DICKINSON	EC-2	Galveston	$7,987.50	$639,000	D-2

* 15% per annum of either the unadjusted statutory sales price or the floor price of the vessel, whichever is higher.

IN WITNESS WHEREOF, the Owner has executed this Addendum in quadruplicate the 16th day of December, 1946, and the Charterer has executed this Addendum the third day of December, 1946.

Execution for Charterer:

ATTEST:

C. RUSSELL WALTON,
Assist. Secretary.

or if not incorporated
In the presence of:

——, ——,
Witness.

EASTERN GAS & FUEL ASSOCIATES,
By: R. C. GOODWIN,
Vice President.

Execution for Owner:

Approved as to form:

ARTHUR E. FERRIS,
Charter, Agency and Traffic Counsel.
By D. ECCLESTON.

UNITED STATES OF AMERICA,
By: UNITED STATES MARITIME COMMISSION,
By: R. L. MCDONALD,
For the Commission.

Contract No. MCc-41881
Addendum No. 2

ADDENDUM to BAREBOAT CHARTER (herein called the "Charter") dated as of October 1, 1946, between the UNITED STATES OF AMERICA, acting by and through the UNITED STATES MARITIME COMMISSION (hereinafter called the "Owner") and EASTERN GAS & FUEL ASSOCIATES (hereinafter called the "Charterer").

WHEREAS, the Owner and the Charterer have heretofore executed a Bareboat Charter (Contract MCc-41881, Shipsalesdemise, Form No. 303) covering certain vessels; and

WHEREAS, Clause C (1) of said charter contemplates the charter of additional vessels to be shown by addenda to be executed; and

WHEREAS, the Charterer has contracted for a certain additional vessel or vessels;

NOW, THEREFORE, in consideration of the premises, the parties hereto agree as follows:

Clause C (1) is amended by the addition of the following vessel or vessels and pertinent particulars:

Name of Vessel	Type	Port of Delivery	Basic Hire Per Calendar Month*	Valuation	Operating Limits as Specified in Clause:
ANDREW STEVENSON	EC-2	Seattle	$7,987.50	$639,000	D-2
WILLIAM BEVAN	EC-2	New York	7,987.50	639,000	D-2

* 15% per annum of either the unadjusted statutory sales price or the floor price of the vessel, whichever is higher.

IN WITNESS WHEREOF, the Owner has executed this Addendum in quadruplicate the 3rd day of February, 1947, and the Charterer has executed this Addendum the 24th day of January, 1946.

Execution for Charterer:

ATTEST:

C. RUSSELL WALTON,
Assist. Secretary.

or if not incorporated
In the presence of:

——, ——,
Witness.

EASTERN GAS & FUEL ASSOCIATES,
By: R. C. GOODWIN,
Vice President.

Execution for Owner:

Approved as to form:

ARTHUR E. FERRIS,
Charter, Agency and Traffic Counsel.
By D. ECCLESTON.

UNITED STATES OF AMERICA,
By: UNITED STATES MARITIME COMMISSION,
By: R. L. MCDONALD,
For the Commission.

Contract No. MCc-41881
Addendum No. 3

ADDENDUM to BAREBOAT CHARTER (herein called the "Charter") dated as of October 1, 1946, between the UNITED STATES OF AMERICA, acting by and through the UNITED STATES MARITIME COMMISSION (hereinafter called the "Owner") and EASTERN GAS & FUEL ASSOCIATES (hereinafter called the "Charterer").

WHEREAS, the Owner and the Charterer have heretofore executed a Bareboat Charter (Contract MCc-41881, Shipsalesdemise, Form No. 303) covering certain vessels; and

WHEREAS, Clause C (1) of said charter contemplates the charter of additional vessels to be shown by addenda to be executed; and

WHEREAS, the Charterer has contracted for a certain additional vessel or vessels;

NOW, THEREFORE, in consideration of the premises, the parties hereto agree as follows:

Clause C (1) is amended by the addition of the following vessel or vessels and pertinent particulars:

Name of Vessel	Type	Port of Delivery	Basic Hire Per Calendar Month*	Valuation	Operating Limits as Specified in Clause:
ISAAC SHARPLESS	EC-2	Baltimore	$7,987.50	$639,000	D-2

* 15% per annum of either the unadjusted statutory sales price or the floor price of the vessel, whichever is higher.

IN WITNESS WHEREOF, the Owner has executed this Addendum in quadruplicate the 21st day of March, 1947, and the Charterer has executed this Addendum the 17th day of February, 1947.

Execution for Charterer:

ATTEST:

C. RUSSELL WALTON,
Assist. Secretary.

or if not incorporated
In the presence of:

——, ——,
Witness.

EASTERN GAS & FUEL ASSOCIATES,
By: R. C. GOODWIN,
Vice President.

Execution for Owner:
Approved as to form:

ARTHUR E. FERRIS,
Charter, Agency and Traffic Counsel.
By D. ECCLESTON.

UNITED STATES OF AMERICA,
By: UNITED STATES MARITIME COMMISSION,
By: R. L. McDONALD,
For the Commission.

Contract No. MCe-41881
Addendum No. 4

ADDENDUM to BAREBOAT CHARTER (herein called the "Charter") dated as of October 1, 1946, between the UNITED STATES OF AMERICA, acting by and through the UNITED STATES MARITIME COMMISSION (hereinafter called the "Owner") and EASTERN GAS & FUEL ASSOCIATES (hereinafter called the "Charterer").

WHEREAS, the Owner and the Charterer have heretofore executed a Bareboat Charter (Contract MCe-41881, Shipsalesdemise, Form No. 303) covering certain vessels; and

WHEREAS, Clause C (1) of said charter contemplates the charter of additional vessels to be shown by addenda to be executed; and

WHEREAS, the Charterer has contracted for a certain additional vessel or vessels;

NOW, THEREFORE, in consideration of the premises, the parties hereto agree as follows:

Clause C (1) is amended by the addition of the following vessel or vessels and pertinent particulars:

Name of Vessel	Type	Port of Delivery	Basic Hire Per Calendar Month*	Valuation	Operating Limits as Specified in Clause:
WILLIAM N. KENDRICK	EC-2	Baltimore	$7,987.50	$639,000	D-2
JAMES BOWDOIN	EC-2	Alameda	7,987.50	639,000	D-2
GEORGE VANCOUVER	EC-2	New York	7,987.50	639,000	D-2

* 15% per annum of either the unadjusted statutory sales price or the floor price of the vessel, whichever is higher.

IN WITNESS WHEREOF, the Owner has executed this Addendum in quadruplicate the 30th day of April, 1947, and the Charterer has executed this Addendum the 23rd day of April, 1947.

Execution for Charterer:

ATTEST:

——, ——,

or if not incorporated
In the presence of:

M. T. CLANCY.
Witness.

EASTERN GAS & FUEL ASSOCIATES,
By: R. C. GOODWIN,
Vice President.

Execution for Owner:

UNITED STATES OF AMERICA,

Approved as to form:

ARTHUR E. FERRIS,
Charter, Agency and Traffic Counsel.
By D. ECCLESTON.

By: UNITED STATES MARITIME COMMISSION,
By: R. L. MCDONALD,
For the Commission.

Contract No. MCc-41881
Addendum No. 5

ADDENDUM to BAREBOAT CHARTER (herein called the "Charter") dated as of October 1, 1946, between the UNITED STATES OF AMERICA, acting by and through the UNITED STATES MARITIME COMMISSION (hereinafter called the "Owner") and EASTERN GAS & FUEL ASSOCIATES (hereinafter called the "Charterer").

WITNESSETH:

WHEREAS, the parties have agreed to include certain additional vessels under this Agreement for special service in the coastwise coal trade (in the carriage of coal between Hampton Roads and New England; and

WHEREAS, the parties desire to treat such vessels as a separate fleet for accounting purposes only during the period of the aforesaid operation;

NOW, THEREFORE, in consideration of the premises, the parties hereto agree as follows:

1. Clause C (1) is amended by the addition of the following vessel and pertinent particulars:

Name of Vessel	Type	Port of Delivery	Basic Hire Per Calendar Month*	Valuation	Operating Limits as Specified in Clause:
WILLIAM MCKINLEY	EC-2	Baltimore	$7,987.50	$639,000	D1(a)

* 15% per annum of either the unadjusted statutory sales price or the floor price of the vessel, whichever is higher.

2. The parties hereto further agree that vessels operating under Clause D1 (a); Part I, in the coastwise coal trade shall be considered as a separate fleet during the period of such operation, for accounting purposes only, in computing additional charter hire under Clause 13, Part II. For the purpose of this clause such period shall be deemed to commence as of delivery of the vessel for such coastwise operation and terminate as of the completion of the last voyage in such special service.

IN WITNESS WHEREOF, the Owner has executed this Addendum in quadruplicate the 17th day of July, 1947, and the Charterer has executed this Addendum the 28th day of May, 1947.

Execution for Charterer:

MYSTIC STEAMSHIP DIVISION,
EASTERN GAS & FUEL ASSOCIATES,
By: R. C. GOODWIN,
Vice President.

ATTEST:

WILLIAM M. BRADY.

Execution for Owner:

Approved as to form:

WADE H. SKINNER,
General Counsel.
By ELMER E. METZ,
By D. ECCLESTON.
Counsel.

UNITED STATES OF AMERICA,
By: UNITED STATES MARITIME COMMISSION,
By: R. L. MCDONALD,
For the Commission.

Contract No. MCc-41881
Addendum No. 6

ADDENDUM to BAREBOAT CHARTER (herein called the "Charter") dated as of October 1, 1946, between the UNITED STATES OF AMERICA, acting by and through the UNITED STATES MARITIME COMMISSION (hereinafter called the "Owner") and EASTERN GAS & FUEL ASSOCIATES (hereinafter called the "Charterer").

WHEREAS, the Owner and the Charterer have heretofore executed a Bareboat Charter (Contract MCc-41881, Shipsalesdemise, Form No. 303) covering certain vessels; and

WHEREAS, Clause C (1) of said charter contemplates the charter of additional vessels to be shown by addenda to be executed; and

WHEREAS, the Charterer has contracted for a certain additional vessel or vessels;

NOW, THEREFORE, in consideration of the premises, the parties hereto agree as follows:

Clause C (1) is amended by the addition of the following vessel or vessels and pertinent particulars:

Name of Vessel	Type	Port of Delivery	Basic Hire Per Calendar Month*	Valuation	Operating Limits as Specified in Clause:
WASHINGTON IRVING	EC-2	Baltimore	$7,987.50	$639,000	D-2

* 15% per annum of either the unadjusted statutory sales price or the floor price of the vessel, whichever is higher.

IN WITNESS WHEREOF, the Owner has executed this Addendum in quadruplicate the 16th day of June, 1947 and the Charterer has executed this Addendum the 9th day of June, 1947.

Execution for Charterer:

ATTEST:

C. RUSSELL WALTON,
Assist. Secretary.

or if not incorporated

In the presence of:

——, ——,
Witness.

EASTERN GAS & FUEL ASSOCIATES,
By: R. C. GOODWIN,
Vice President.

Execution for Owner:

Approved as to form:

ARTHUR E. FERRIS,
Charter, Agency and Traffic Counsel.
By D. ECCLESTON.

UNITED STATES OF AMERICA,
By: UNITED STATES MARITIME COMMISSION,
By: R. L. MCDONALD,
For the Commission.

SHIPSALES DEMISE
(Foreign Trade Addendum)

Contract No. MCc 41881
Addendum No. 7

ADDENDUM TO BAREBOAT CHARTER AGREEMENT (herein called the "Agreement") dated as of October 1, 1946, between the UNITED STATES OF AMERICA, acting by and through the UNITED STATES MARITIME COMMISSION (hereinafter called the "Owner") and EASTERN GAS & FUEL ASSOCIATES (hereinafter called the "Charterer"), WITNESSETH:

WHEREAS, on August 15, 1947 the Owner served notice of termination pursuant to Clause 14, Part II, with respect to vessels hereunder operating in foreign trades, and simultaneously advised that the Charterer would be given an opoportunity to continue the use of such vessels under charter in accordance with new terms and conditions to be announced, and

WHEREAS, such new terms and conditions were promulgated by the Owner ~~on August 20, 1947~~ and were accepted by the Charterer, with respect to the vessels hereinafter named, and

WHEREAS, the parties hereto desire to amend this Agreement accordingly.

NOW, THEREFORE, in consideration of the premises, this Agreement is hereby amended as follows with respect to vessels engaged in foreign trades, which are listed on the attached schedule marked "Exhibit A" and made a part hereof by reference:

I. *Period of Vessel's Use.* A maximum period of about six months from the effective date of this Addendum, it being expressly agreed that no voyage shall be commenced after February 29, 1948.

II. *Termination.* The right of either Owner or Charterer to terminate this Agreement pursuant to Clause 14, Part II, may not be exercised (a) with respect to vessels which on September 1, 1947 are covered by this Agreement before November 1, 1947, and (b) with respect to vessels delivered for operation under this addendum subsequent to

September 1, 1947, before the expiration of sixty days from the date of such delivery.

III. *Additional Charter Hire.* Additional charter hire, pursuant to Clause 13, Part II, shall be computed, accounted for and paid separately for voyages which are subject to the terms of this addendum, which shall be treated for accounting purposes as if it constituted a separate charter between the parties. For the purpose of computing aditional charter hire, all voyages commenced on or after September 1, 1947, irrespective of when the vessels are allocated, and all voyages with respect to vessels allocated subsequent to August 20, 1947, irrespective of when such voyage commences, shall be subject to the terms of this Addendum; and all voyages commenced prior to September 1, 1947, with respect to vessels allocated on or before August 20, 1947—shall be subject to the provisions of this Agreement in effect prior to the effective date of this Addendum.

IV. *Net Voyage Profit.* An additional paragraph shall be inserted following the first paragraph of sub-paragraph (a), Clause 23, Part II, entitled "Net Voyage Profit", reading as follows:

> "Upon application of the charterer supported by adequate data based on past experience, the Commission will permit the inclusion in vessel operating expenses of such charges as the Commission determines to be fair and reasonable to provide reserves for vessel repair expenses and/or P. and I. insurance deductible average losses on all voyages terminating after December 31, 1946, provided that at the time of final accounting hereunder each of such reserves shall be adjusted to actual by distributing the balances therein to net voyage profit for the accounting periods involved in the same ratio as the reserve charges to vessel operating expenses in each such period bears to the total thereof for the entire period."

V. *Vessel Lay-up Expenses.* In the event Charterer redelivers any vessel on or after August 15, 1947 and later applies for the charter of such vessel or any other vessel under the terms of this addendum, the cost of delivery from lay-up or otherwise of the vessel so applied for (excluding the cost of repairs) and the cost of redelivery of such vessel (including cost of placing vessel in lay-up) upon termination of this Agreement shall be for Charterer's account and shall not be taken into account in determining additional charter hire pursuant to Clause 13, Part II.

In the event no redelivery is effected subsequent to August 15, 1947 and any additional vessel is chartered under the terms of this addendum, the cost of delivery of such vessel from lay-up or otherwise (excluding the cost of repairs) and the cost of redelivery of such vessel (including the cost of placing vessel in lay-up) upon termination of this Agreement shall be paid for by Charterer but shall be included as voyage expense in determining additional charter hire under Clause 13, Part II.

VI. *Port of Redelivery.* Unless otherwise mutually agreed, vessels allocated hereunder after August 20, 1947, shall be redelivered to the Owner's laid-up fleet at a point to be designated by the Owner, but on the same coast of the United States (i.e. Atlantic, Pacific or Gulf Coast, as the case may be), as the port of delivery.

VII. *Effective Date.* Except as herein otherwise provided this Addendum shall become effective as of September 1, 1947.

IN WITNESS WHEREOF, the Owner has executed this Addendum in quadruplicate the 13th day of October, 1947, and the Charterer has executed this Addendum the 3rd day of October, 1947.

Execution for Charterer:

ATTEST:

C. RUSSELL WALTON,
Assistant Secretary,

or if not incorporated

In the presence of:
——, ——,
Witness.

EASTERN GAS & FUEL ASSOCIATES,
By: R. C. GOODWIN,
Vice President.

Execution for Owner:

Approved as to form:

GEORGE S. ROBINSON,
Acting Chief of the Bureau of Law.
By: ELMER E. METZ.

UNITED STATES OF AMERICA,
By: UNITED STATES MARITIME COMMISSION,
By: R. L. MCDONALD,
For the Commission.

Exhibit A

WILLIAM MCKINLEY
EMILY DICKINSON
WILLIAM BEVAN
ISAAC SHARPLESS
ANDREW STEVENSON
JAMES BOWDOIN
GEORGE VANCOUVER
WASHINGTON IRVING

VOLUME II. EXHIBIT C

[Eastern's application to charter, dated July 25, 1946]

APPLICATION TO CHARTER WAR-BUILT VESSEL(S)

Filed by EASTERN GAS AND FUEL ASSOCIATES a citizen of The United States of America

The undersigned hereby offers to charter for bare-boat use the war-built dry cargo vessel(s) hereinafter described (herein called the "war-built vessel(s)"), in accordance with the provisions of the Merchant Ship Sales Act of 1946, Public Law 321, 79th Cong., 2d Sess., approved March 8, 1946, (herein called the "act"), and the rules and regulations prescribed by the United States Maritime Commission (herein called the "Commission"), sections 299.1 to 299.91 inclusive, of General Order 60, published in the Federal Register F. R. Doc. 46-6683 (herein called the "regulations"), which the applicant agrees shall be binding in all transactions in connection with this application. Applicant also agrees that any amendment or modification of the rules and regulations shall be binding in all transactions approved by the Commission after the date of publication of such amendment or modification in the Federal Register.

In order to induce the Commission to act favorably on this application, the applicant submits in support thereof the following information:

C. *As to the war-built vessels*

12. Applicant offers to charter for bare-boat use the war-built dry cargo vessel(s) designated in items 13 and 14, or the alternative vessels designated in item 15.

13. If specific vessels are applied for, as distinguished from any one or more of a given type, the names of the vessels must be given under this item.

14. If applicant is willing to accept any one or more vessel(s) of a given type or designation, as distinguished from particular vessels, the type or designation of the vessels desired should be set forth as follows:

One vessel(s) of
Type EC 2 (Liberty) Collier
Commission's designation EC 2-S-AW 1
Particular characteristics Collier

• • • • •

EASTERN GAS AND FUEL ASSOCIATES,
Name of Applicant.

(COMMON SEAL.)

By /s/ R. C. GOODWIN,
Vice President.

Attest:

/s/ C. RUSSELL WALTON,
Assistant Secretary.

Dated as of May 8, 1946, but actually executed on July 25, 1946.

• • • • •

VOLUME II. EXHIBIT D

[Maritime Commission telegram of August 12, 1946]

AUGUST 12, 1946.

THE FOLLOWING TELEGRAM IS TO BE SENT TO ALL PERSONS, FIRMS OR CORPORATIONS ON THE ATTACHED LIST.

ALL WAR-BUILT VESSELS HEREAFTER CHARTERED AND DELIVERED ON AND AFTER AUGUST 31, 1946 WILL BE CHARTERED BY THE MARITIME COMMISSION PURSUANT TO THE PROVISIONS OF THE MERCHANT SHIP SALES ACT OF 1946. THE FORM OF FLEET CHARTER TO BE MADE EXCEPT FOR LONG TERM CHARTERS WILL BE SUBSTANTIALLY THE W.S.A. WARSHIPDEMISEOUT 203 FORM ADAPTED TO CONFORM TO THE REQUIREMENTS OF THE MERCHANT SHIP SALES ACT OF 1946 WITH THE FOLLOWING SPECIFIC MODIFICATIONS:

1. THE PERIOD OF THE CHARTER SHALL BE ABOUT SIX MONTHS WITH PROVISIONS FOR FIFTEEN DAY CONCELLATION BY EITHER PARTY.

2. THE RATE OF BASIC HIRE WILL BE AT RATE OF FIFTEEN PER CENT PER ANNUM OF EITHER THE UNADJUSTED STATUTORY SALES PRICE OR THE FLOOR PRICE OF THE VESSEL, WHICHEVER IS HIGHER.

3. THE ADDITIONAL CHARTER HIRE PAYABLE UNDER AND DURING THE PERIOD OF THE FLEET CHARTER SHALL BE (a) 50 PER CENT OF THE AVERAGE NET VOYAGE PROFIT UP TO THE FIRST $100 PER DAY IN EXCESS OF 10 PER CENT OF CHARTERER'S CAPITAL NECESSARILY EMPLOYED IN THE BUSINESS, AND (b) 75 PER CENT OF THE NEXT $200 PER DAY, AND (c) 90 PER CENT OF ALL NET VOYAGE PROFITS IN EXCESS OF $300 PER DAY.

TELEGRAPHIC OR WRITTEN ACCEPTANCE ADDRESSED TO SECRETARY, MARITIME COMMISSION, OF THE CONDITIONS OF THE MARITIME COMMISSION FORM OF CHARTER AS ABOVE OUTLINED MUST BE RECEIVED WITHIN FIVE DAYS FROM DATE.

EXCEPTED FROM THE FOREGOING ARE COMMITMENTS OR CHARTERS WITH RESPECT TO ANIMAL CARRYING VESSELS WHICH WILL BE THE SUBJECT OF SPECIAL ARRANGEMENTS.

W. W. SMITH,
Chairman,
U.S. Maritime Commission.

GRANVILLE CONWAY,
Administrator,
War Shipping Administration.

VOLUME II. EXHIBIT E

[Eastern's telegram of September 20, 1946]

WU37 22

WASHINGTON DC SEP 20 1946 1128A

A J WILLIAMS, SECRETARY
U S MARITIME COMMISSION

WITH REFERENCE TO OUR APPLICATION TO CHARTER NO. 2375 WE HEREBY ACCEPT THE PROVISIONS OF YOUR JOINT WIRE OF AUGUST 12, 1946

EASTERN GAS & FUEL ASSOCIATES BY C RUSSELL WALTON
ASSISTANT SECRETARY

1153A
2375 12 1946.

VOLUME II. EXHIBIT G

[Eastern's telegram of September 30, 1946]

WA13 46 3 EXTRA SER

WUX BOSTON MASS SEP 30 1047A

LEGAL DEPT

U S MARITIME COMMISSION ATT J FRIEDLANDER JR

CHIEF CHARTERING SEC

WE ACKNOWLEDGE RECEIPT OF YOUR TELEGRAM OF SEPTEMBER 27 ADVISING ALLOCATION OF MERRICAM XXXXXXXXX MERRIMAC SEAM WE WISH TO INFORM YOU THAT WE ARE READY WILLING AND ANXIOUS TO TAKE DELIVERY OF THIS VESSEL AS OF VESSELS READINESS UNDER MC FLEET BAREBOAT FROM CHARTER

EASTERN GAS AND FUEL ASSOCIATES BY C RUSSELL WALTON

ASST SECTY

1100A

VOLUME II. EXHIBIT I

[Eastern's summary of April 11, 1947]

[Letterhead omitted]

Summary of Application of Eastern Gas & Fuel Associates

(dated April 9, 1947, (filed April 10, 1947)

The Commission is urged to:—

(1) Determine that the experimental gas turbine be installed in a Standard Liberty ship in lieu of in the Liberty Collier, S.S. MERRIMAC SEAM, thus increasing the revenue of sales of vessels under the Act and expanding the field of the experiment.

(2) Sell the S.S. MERRIMAC SEAM to Applicant under its application to purchase, dated May 8, 1946 and priority thus established, to assist it to overcome its deficiencies in coastwise coal trade tonnage.

(3) Arrange with Applicant by charter or otherwise for operation of gas turbine—Standard Liberty ship at cost to Applicant with payment of 100% of profit and $200,000—to the Commission by Applicant.

April 11, 1947.

VOLUME II. EXHIBIT J

[Eastern's letter of April 21, 1947]

[Letterhead omitted]

April 21, 1947.

We believe strongly the Commission should:

1. Install the experimental gas turbine in a standard type Liberty ship instead of in the only remaining Liberty Collier MERRIMAC SEAM, because of:—

   (a). Deficiency of tonnage to carry coal trade requirements.

   (b). Fast approaching economic limit of life of several old and deep-draft colliers.

   (c). Immediate market for sale of remaining Liberty collier.

   (d). Opportunity for Commission to experiment with the more plentiful type vessel and if the experiment is successful to interest the many operators in offshore trades where such propulsion machinery could produce more attractive benefits of increased speed and fuel economy.

2. Sell the Liberty collier MERRIMAC SEAM (as is) to Eastern Gas and Fuel Asspciates under its priority and application dated May 8, 1946, because:—

   (a). Our deficiency in vessels to carry coal cargoes to our deep draft consignees is the greatest and most serious in the trade.

   (b). We must maintain our old large colliers at very large annual expenditure until they can be replaced by newer colliers.

   (c). We have insufficient vessels to carry practically any of the tonnage of sulphur and phosphate rock, in which trade we had been the largest commercial carriers for about 16 years.

(d). For many years we held annual contracts with at least two consumers for a large part of their cargoes and in some cases for all that we could carry annually in one ship and we now have no bulk cargo vessels which we can place in this trade.

(e). Of the five original applicants in the coal trade for the purchase of Liberty Colliers, we are one of the two which did not get all they requested and the only one which has since required more such vessels than it had (we have chartered vessels and barges from others).

(f). If necessary to further the Commission's program of retiring old tonnage we will trade in one of our old colliers in exchange.

(g). We have offered through point (3) below to reimburse the Commission by extra charter hire for a large part of its expense in point (1) above.

(h). We conceived this idea which will benefit the Commission as well as ourselves.

3. Charter the standard Liberty ship with experimental gas turbine to us at cost with our payment of *all profits* and $200,000 additional to the Commission because:—

(a). We are the best established in coastwise trades to place this vessel on the desired runs.

(b). We are prepared to collaborate at our own expense in engineering research for the Commission.

(c). We are the first to offer our services as charterers of this vessel.

(d). Such charter would provide a medium for our reimbursing the Commission for portion of extra engineering costs.

FBC:vcf

Volume II. Exhibit K

[Dates of delivery and redelivery of chartered vessels]

Eastern Gas and Fuel Associates

Contract No. MCc-41881

Vessel	Delivered	Redelivered
Andrew Stevenson	1/ 7/47	11/19/47
Emily Dickinson	11/13/46	11/20/47
George Vancouver	4/11/47	12/11/47
Isaac Sharpless	12/28/46	11/30/47
James Bowdoin	3/12/47	11/29/47
Merrimac Seam	11/20/46	7/30/47
William Bevan	12/ 7/46	12/11/47
William H. Kendrick	2/22/47	4/25/47
William McKinley	2/20/47	12/19/47
Washington Irving	5/21/47	11/15/47

VOLUME II. EXHIBIT L2

[Eastern's letter of March 31, 1947]

[Letterhead omitted]

March 31, 1947.

Mr. J. M. Quinn, Managing Director,
Finance Department,
U. S. Maritime Commission,
Washington 25, D. C.

DEAR SIR:

Enclosed please find three copies of statement covering the preliminary determination of additional charter hire for the period of January 1, 1947, to January 31, 1947.

The terminated voyages included therein cover the operation of the coastwise collier MERRIMAC SEAM for the period mentioned. It shows a preliminary payment due in the amount of $9,018.00 for which we are enclosing our check.

Trusting you will find this statement in order, beg to remain

Yours very truly,

MYSTIC STEAMSHIP DIVISION,
EASTERN GAS AND FUEL ASSOCIATES.
R. C. GOODWIN,
Vice President.

RCG.MC
encls.

[Accounting enclosed with above letter, calculating secondary contingent hire at each of the rates (50%-75%-90%) prescribed in charter Clause 13, is not reproduced.]

VOLUME II. EXHIBIT L5

[Eastern's letter of July 9, 1947]

[Letterhead omitted]

July 9, 1947.

Mr. J. M. Quinn, Managing Director,
Finance Department,
U.S. Maritime Commission,
Washington 25, D.C.

DEAR SIR:

* * * * *

Enclosed please find four copies of statements of preliminary determination of additional charter hire for the period January 1st to April 30th, 1947, together with our check in the amount of $71,503.00 to cover payment determined to be due at this time.

We have, as suggested in your letter of June 30th, made the best estimations of unrecorded expenses in the short time available, and note that no extension for filing reports can be granted.

We have not replied to your letter of May 21st as it was hoped our Mr. Russell Walton would have had an opportunity to call upon you and explain our situation, which can be done much better than by letter. However at this time such an opportunity has not occurred.

We do not feel that the method of determining Capital Employed, applied to the Balance Sheet for our Steamship Division, gives an equitable result. As previously explained, up to the time we assumed operation of your vessels under Bare Boat Charter arrangements, it had been our practice to carry bank balances in excess of immediate requirements, and other items in the name of the company, without showing any division designation. The Mystic Steamship Division Balance Sheet was therefore at best a tentative one. Financing of Divisions was done from the company as needs arose. It was for this reason that

when application for Bare Boat Charters were filed for, we submitted the Balance Sheet of the company and not of Mystic Steamship Division alone.

With this arrangement in mind, we submit that it is not equitable to arbitrarily assume that two-thirds of our working capital, as reflected at any particular date on the Division Balance Sheet, would be required for the operation of our other activities, as is done under the formula laid down in General Order 60. The amount of working capital required to operate our own coastwise fleet for example is obviously much less than required for offshore vessels. Rather it might well be assumed that all of the working assets are available for Bare Boat vessel requirements, and that operation of our own vessels can be financed as needs arise under the company's long established policies.

We have this month again used for the determination of capital employed, the formula allowed in the absence of an exact allocation of Balance Sheet Items and trust, with the explanation above and pending a call upon you by our Mr. Walton, you may accept this as satisfactory for the present.

Very truly yours,

EASTERN GAS AND FUEL ASSOCIATES,
R. C. GOODWIN,
Vice President.

RCG:R
encls.

[Accounting enclosed with above letter, calculating secondary contingent hire at 50 percent and 75 percent rates prescribed in charter Clause 13, is not reproduced.]

VOLUME II. EXHIBIT L8

[Eastern's letter of September 30, 1947]

[Letterhead omitted]

September 30, 1947.

United States Maritime Commission,
Washington, D. C.

Att: A. C. Waller, Chief Audits Division

GENTLEMEN:

We enclose statements for the determination of additional Charter Hire for voyages terminated prior to July 31, 1947 together with our remittance for $10,019., the amount indicated as due at this time.

As instructed we have made separate calculations for coastwise voyages, although we had assumed from Mr. Williams telegram of June 30, 1947 that separate accounting would be required only for domestic voyages commencing after June 30th.

With regard to the use of the formula for the determination of Capital Invested we direct your attention to our letter to Mr. Quinn of July 9, 1947. As indicated our balance sheet, as submitted, is that of the Steamship Division of Eastern Gas and Fuel Associates, but does not necessarily reflect the full resources available for steamship operations. It has long been our policy to finance all operating divisions as required from the consolidated funds of the parent company. The transfer of additional capital on June 30, 1947 was made to meet your Balance Sheet requirements as to Bare Boats, and if you insist on the use of the Mystic Steamship Division Balance Sheet, this amount should perhaps be properly charged 100% to Bare Boat operations.

In view of our peculiar situation, we still feel that as a matter of equity we should be allowed to continue the use of the formula for the determination of Capital Investment Allowance. Our consolidated Balance Sheet attached will demonstrate we have ample working capital to meet all requirements.

Very truly yours,

MYSTIC STEAMSHIP DIVISION,
EASTERN GAS AND FUEL ASSOCIATES.
R. C. GOODWIN,
Vice President.

Encs.

[Accounting enclosed with above letter, calculating secondary contingent hire at each of the rates (50%-75%-90%) prescribed in charter Clause 13, is not reproduced.]

VOLUME II. EXHIBIT M

[Eastern's letter of April 26, 1950]

[Letterhead omitted]

April 26, 1950.

Mr. E. Barker, Area Auditor,
U.S. Maritime Commission,
Room 1201, Custom House,
Boston, Mass.

Subject: Final Accounting under Shipsalesdemise 303

DEAR SIR:

As suggested I am setting forth below some of the problems we will encounter in rendering final accountings.

Any information or advice as to how these should be treated will be appreciated.

Capital Employed:—See copy of letter of July 9, 1947

For reasons stated we feel we should be allowed to use the formula. It is not possible in our situation to make any exact statement of working capital available to The Steamship Division.

Tail Shafts and Rudders:

We have filed Public Vouchers under date of October 5, 1949 in the amount of $110,281.83 but have heard nothing from The Commission regarding disposition.

Delays in Accepting Deliveries:

We have filed Public Vouchers under date of November 21, 1949 in the amount of $6,477.57 to cover estimated expense incurred. No comment from The Commission.

Expendable Equipment Inventories:

No report of Overages or Shortages has been received from the Commissions Inventory Section. It is indicated that a very long time may elapse before this can be accomplished. We question whether we, if willing, could do this work, inasmuch as our records are mainly rough notes.

Assuming an adjustment will be necessary how does the Commission propose to effect this, after all accounts are in?

If we should undertake to do this work how does the Commission propose to reimburse for the expense incurred?

Post Delivery Overhead Expense:

How will charterer be reimbursed for these assuming final accountings have been rendered?

Carry Back of Losses:

A sense of fairness would indicate this should be allowed. Latest information I have states this question was still under consideration. Has any final decision been arrived at?

Quay Dues:

What evidence, if any, required to demonstrate that these are uncollectible?

Claims & Accounts Receivable Unpaid:

If final accounting insisted upon at this time it is assumed these must be treated as bad debts.

Liabilities:

What does Commission propose to do about claims which may arise after final accounting has been rendered?

A list of all unsettled items in connection with the operations under Bare Boat Charters is attached for your information as requested.

Very truly yours,

MYSTIC STEAMSHIP DIVISION,
EASTERN GAS AND FUEL ASSOCIATES.
E. C. MELVILLE,
Auditor.

ECM:R
encls.

VOLUME II. EXHIBIT N

[Eastern's letter of August 7, 1951]

[Letterhead omitted]

August 7, 1951.

Mr. J. F. Keating, District Comptroller,
Department of Commerce,
Maritime Administration,
45 Broadway,
New York 6, N.Y.

Attention: Mr. T. Conroy

DEAR SIR:

In accordance with your request we submit herewith our Final Accounting with appropriate certificates showing the present determination of this company's aggregate gross liability for "Additional Charter Hire" under Bareboat Charter Agreements (SHIPSALESDEMISE 303).

Examination of our records now indicates the following amounts payable to you based upon our interpretation of existing rules and regulations:

Schedule A—Amount of additional Charter Hire as per enclosed certified statement		$180,482 38
Management Fees (Recapture) U.S.M.C. Invoice 909-200 dated 3/10/48		37,552 61
Net Amount Due—Delivery—redelivery inventories B. B. Vessels		
Revised Delivery Inventories	$96,243 92	
Less: paid or deducted	69,556 52	
		26,687 40
Adjustment of Husbanding Fees—1946 net adj. revised billing	5,595 00	
Compensation as General Agent P. V. dated 11/5/47	2,885 00	2,710 60
Total Payable		$247,432 39

Our records also indicate that the following amounts due to us from you based upon our interpretation of existing rules and regulations:

Rudder & Tailshaft Repairs		$78,786.31
Charter Hire		
SS Page—June 1946	25,727.80	
SS Richards—7/1/46	296.97	
SS Noyes—7/1-3/46	2,051.59	
SS Newton—7/1-3/46	2,049.56	
SS G. White—7/1/46	432.25	
SS W. Gulf—7/1-5/46	3,799.41	
SS S. Point—7/1-3/46	1,661.64	
SS A. L. Kent—7/1-2/46	1,294.32	
SS T. P. Beal—7/1-2/46	1,395.65	
		$38,709.19
Removal of Defense Features		96,850.24
Addendum #6—		
Contract WSA 2631-R-SS G. White	23,089.72	
2446-R-SS J. L. Richards	18,511.00	
2627-R-SS Kopperston	27,122.80	
2444-R-SS Newton	12,420.72	
2635-R-SS W. Gulf	15,706.00	
(P. Vouchers not filed)	96,850.24	
Miscellaneous		
Management Fees—Liquidating Nov. 1948 P. V. dated 12/1/48	45.00	
Management Fees—Liquidating Oct. 1948 P. V. dated 11/3/48	465.00	
Repairs—SS Innesmoor—Job 273—2/18-27/43—Inv. 3/27/43 a/c Reaudit	189.36	
Repairs—SS Tampico—Job 351—12/17/42-2/13/43—Inv. 10/27/43—a/c Reaudit	370.65	
Repairs—SS T. P. Beal—Job—3/29/44—P. V. 5/31/44—a/c Reaudit	107.61	
Repairs—SS F. Tausig—7/-/44—(No P. V.)	632.10	
East Boston Plant retro. wage adj.—a/c repairs 12/31/44-6/30/45—P. Vchrs. 3/24/48	54.48	
	.65	
Genl. Supervisory service 4/12 P. V. 1/14/46	100.00	
Cl. 40229 SS J. L. Richards P. V. 11/24/48	3,101.71	
Adj. of Rep. SS Isaac Sharpless—Job 380—3/10-24/43—Inv. 11/4/43—a/c Reaudit	112.54	
	4,954.02	
Total Receivable		$219,299.76

We enclose herewith our check for $28,132.63, representing the amount by which our obligations to you exceed yours to us. This check may be applied against any of the items on Schedule A; if such an application is made by you, please advise us so our records may reflect the application.

This payment is being made on account at this time with the knowledge that certain items are presently being contested and that additional or amended rules and regulations may affect these obligations. Your acceptance of our check on account shall not be deemed to be an acceptance of the method of accounting adopted by us, nor of any agreement that the payment is accepted by you in final settlement of any of the items shown on the foregoing Schedules A or B. This payment and your acceptance thereof shall be without prejudice to the rights of either of us to contest the validity and amount of any claims between us.

Very truly yours,

EASTERN GAS AND FUEL ASSOCIATES,
A. K. WOOD,
Treasurer.

ECM:td

AFFIDAVIT

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

A. K. Wood, being first duly sworn on his oath, states: That I am Treasurer of the Mystic Steamship Division, Eastern Gas and Fuel Associates Charterer under bareboat charter agreement with the United States Maritime Commission known as "SHIPSALESDEMISE 303" (MCc 41881); that, as such, employees under my direction are responsible for the accuracy and maintenance of the books of account and financial records of the Charterer and are thoroughly familiar with such books and records and with the terms and conditions of the aforesaid bareboat charter agreement and with the orders, rules, regulations, and instructions appertaining thereto as issued by the United States Maritime Commission; that I have consulted with such employees and have carefully examined the statements comprising the accounting annexed hereto covering the period from November 1, 1946, to July 31, 1951, under the aforesaid bareboat charter agreement; and that, to the best of my knowledge and belief, the said accounting reflects a true and complete statement of the additional charter hire accrued to the United States Maritime Commission under the aforesaid bareboat charter agreement during the period from November 1, 1946, to December 31, 1947, under the terms and conditions thereof and in accordance with the orders, rules, regulations, and instructions issued by the United States Maritime Commission appertaining thereto; the balance sheets included in the annexed accounting fairly present the financial position of the Mystic Steamship Division of the Charterer as at the dates thereof, including (but not limited to) an adequate statement of all known and ascertainable liabilities, and the income sheet included in the annexed accounting correctly states the operating results of the Charterer for the period covered by such accounting. All the foregoing is subject to the qualifications contained

in the certificate of Messrs. Arthur Young & Company, accompanying this affidavit.

A. K. Wood.

Subscribed and sworn to before me, a Notary Public, in and for the aforesaid County and Commonwealth, this 8th day of August, 1951.

My commission expires September 5, 1952.

Hebert B. Hallis,
Notary Public.

NEW YORK
CHICAGO
BOSTON
DALLAS
DETROIT
HOUSTON
KANSAS CITY
LOS ANGELES
MILWAUKEE
PHILADELPHIA
PITTSBURGH
TOLEDO
TULSA
WICHITA

ARTHUR YOUNG & COMPANY
Accountants and Auditors
80 Federal Street
Boston 10, Massachusetts

CANADA
ENGLAND
FRANCE
VENEZUELA

Maritime Administration,
U. S. Department of Commerce,
Washington, D. C.

DEAR SIRS:

We have examined the accompanying statements comprising the "Final Accounting" of Mystic Steamship Division of Eastern Gas and Fuel Associates required by General Order 60, Supplement 21, under Bareboat Charter Agreements (SHIPSALESDEMISE 303-MCc41881) between Mystic Steamship Division and the U. S. Maritime Commission (now Maritime Administration) for the period from November 1, 1946 to December 31, 1947. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances, except that we did not physically verify the various types of inventory aboard vessels at the beginning and end of each accounting period. We have previously made examinations of the financial position and the results of operations of Mystic Steamship Division covering the periods affected in conjunction with the annual examination of Eastern Gas and Fuel Associates. The accounting records of Mystic Steamship Division are maintained on a divisional basis, and therefore do not necessarily reflect all the non-operating transactions which would be reflected if this division were a separate and distinct corporate entity.

The accompanying "Final Accounting", which reflects an aggregate gross liability of $454,580.05 for "additional charter hire" under the above agreements and a net lia-

bility of $181,418.05 after applying payments of $273,162.00 made to date, represents a detailed accounting as of the present date, but is not final due to possible adjustments for additional post redelivery overhead expenses, rudder and tailshaft repair expenses, overages and shortages of expendable inventories and such other adjustments as may be required due to subsequent decisions or rulings of the Maritime Administration, subsequent collection or non-collection of claims or accounts receivable now unpaid, and subsequent establishment of any liabilities which have not yet arisen. With respect to expenditures for rudder and tailshaft repairs, Mystic Steamship Division has set the amount of such repairs up on its balance sheet as a claim against the Maritime Administration and has excluded such amount from expenses of operating vessels under the Bareboat Charter Agreements.

In our opinion, subject to the qualifications in the two preceding paragraphs, the accompanying statements have been prepared in accordance with the terms and conditions of the applicable charter agreements and with the applicable orders, rules, regulations and instructions issued by the Maritime Administration and fairly present the proper determination of "additional charter hire" accrued to the account of the Maritime Administration under such agreements for the period from November 1, 1946 to December 31, 1947.

There is also attached, as Exhibit AA, a computation of "additional charter hire" under the above agreements based on the use of "net worth requirements" as "capital necessarily employed", which computation results in a net liability of $180,482.38 after applying payments of $273,162.00 made to date. In our opinion, subject to the qualifications in the first two paragraphs above, this exhibit is a correct computation on the basis outlined therein.

ARTHUR YOUNG & COMPANY.

Boston, Massachusetts, July 31, 1951.

[Final accounting enclosed with above letter and certificate, calculating secondary contingent hire in accordance with charter Clause 13, is not reproduced.]

VOLUME II. EXHIBIT P

[Eastern's letter of September 14, 1954]

[Letterhead omitted]

September 14, 1954.

Your Reference File:
QM67/L25-6-2:43002 (EAB)

U.S. Department of Commerce,
Maritime Administration,
45 Broadway,
New York 6, New York.

Attn: Mr. E. B. Donnelly

For: J. G. Barkan, District Comptroller

Subject: Supplementary Accountings under
Shipsalesdemise 303, Contract MCc-41881

GENTLEMEN:

As requested in your letter of September 1, enclosed is signed affidavit, in quadruplicate, in accordance with requirements by the provisions of Part VI of Supplement 21 of General Order 60.

Very truly yours,

MYSTIC STEAMSHIP DIVISION,
Eastern Gas and Fuel Associates.
C. R. WALTON,
Vice President.

Encls.

AFFIDAVIT

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

Henry W. Leander, being first duly sworn on his oath, states: That I am Assistant Auditor of the Mystic Steamship Division, Eastern Gas and Fuel Associates, Charterer under bareboat charter agreement(s) with the United States Maritime Commission known as "WARSHIPDEMISEOUT 203" (WSA —)/"SHIPSALESDEMISE 303" (MCc-41881)'; that, as such, I am responsible for the accuracy and maintenance of the books of account and financial records of the Charterer and am thoroughly familiar with such books and records and with the terms and conditions of the aforesaid bareboat charter agreement and with the orders, rules, regulations, and instructions appertaining thereto as issued by the United States Maritime Commission, that I have carefully examined the statements comprising the accounting annexed hereto covering the period from November 1, 1946 to December 31, 1947, under the aforesaid bareboat charter agreement(s); and that, to the best of my knowledge and belief, the said accounting reflects a true and complete statement of the additional charter hire accrued to the United States Maritime Commission under the aforesaid bareboat charter agreement(s) during the period from November 1, 1946 to December 31, 1947, under the terms and conditions thereof and in accordance with the orders, rules, regulations, and instructions issued by the United States Maritime Commission appertaining thereto; the balance sheets included in the annexed accounting fairly present the financial position of the Charterer as at the dates thereof, including (but not limited to) an adequate statement of all known and ascertainable liabilities, and the income sheet included in the annexed accounting correctly states the operating results of the Charterer for the period covered by such accounting.

HENRY W. LEANDER.

Subscribed and sworn to before me, a Notary Public, in and for the aforesaid County and State, this 14th day of September, 1954.

My Commission expires October 17, 1958.

PAUL M. JAQUITH,
Notary Public.

Adjustment of Final Accounting Under SHIPSALESDEMISE 303 MCc—41881

December 1953.

Under date of August 7, 1951, the "Final Accounting" of Mystic Steamship Division of Eastern Gas & Fuel Associates under SHIPSALESDEMISE 303-MCc-41881 was filed with the Maritime Administration. As pointed out in the accompanying report of Arthur Young & Company, accountants and auditors, the determination of "additional charter hire" in that "Final Accounting" represented a detailed accounting as of that date, but was not final due to "possible adjustments for additional post redelivery overhead expenses, rudder and tailshaft repair expenses, overages and shortages of expendable inventories and such other adjustments as may be required. . . ." The report also stated: "With respect to expenditures for rudder and tailshaft repairs, Mystic Steamship Division has set the amount of such repairs up on its balance sheet as a claim against the Martime Administration and has excluded such amount from expenses of operating vessels under the Bareboat Charter Agreements."

Under date of May 13, 1953, the Maritime Administration submitted its invoice #311-131 for "Adjustment of Additional Charter Hire pursuant to Clause 13 of Part II of SHIPSALESDEMISE 303—Bareboat Charter Agreement No. MCc-41881" reflecting certain mathematical adjustments in the computation of additional charter hire between the "Final Accounting" submitted under date of August 7, 1951 and the adjusted accounting dated February 12, 1952. The gross amount of additional charter hire shown by this invoice was $464,876.09. This amount was used in arriving at a settlement of outstanding accounts between the Maritime Administration and Mystic Steamship Division under date of August 12, 1953, at which time a check in the amount of $33,846.80 was forwarded by Mystic Steamship Division to the Maritime Administration.

Under date of October 5, 1953, Mystic Steamship Division advised the Maritime Administration that further ad-

justments of the computation of additional charter hire under the Bareboat Agreements would be required to reflect (1) rudder and tailshaft repair expenses and (2) additional post redelivery overhead expenses.

Rudder and tailshaft repair expenses:

During the period of operations under the Bareboat Charter Agreements, certain expenditures ($78,786.31) were incurred by Mystic Steamship Division for repairs and renewals of the rudders and/or tailshafts of substantially all of the vessels under charter. Under date of October 5, 1949 these expenditures, together with certain additional amounts representing charter hire and operating expenses during the period of repair, plus towboat and pilotage service charges, were submitted to the Maritime Administration for reimbursement on Public Vouchers. A summary of these amounts is submitted in Schedule 3 herewith.

In December 1949, libels against the United States of America were filed to recover the amounts involved with respect to eight of the ten vessels.

On February 26, 1952, the above libels were discontinued by the filing of a discontinuance as to each vessel.

Since the Maritime Administration took the position that the rudder and tailshaft repair expenditures were not caused by a latent defect in the vessels at time of delivery to the charterer, these expenditures must then represent operating expenses during the period of charter. As explained in the accountant's report accompanying the original "Final Accounting", these expenses ($78,786.31) were set up on the balance sheet as a claim receivable against the Maritime Administration and were excluded from operating expenses in such "Final Accounting". A recomputation of the amount of "additional charter hire" due the Maritime Administration under this charter agreement after reflecting these repair and renewal expenditures as additional operating expenses (as well as other items explained below) is submitted herewith in Schedules 1 and 2.

Additional post redelivery overhead expenses:

In order to facilitate the final settlement as to delivery and redelivery inventories of expendable equipment and spare parts with the Maritime Administration, Mystic Steamship Division retained an outside firm—Maritime Associates—to compute the amount of the redelivery inventories and to settle any disputes as to the net "overs and shorts" with the Maritime Administration. This work was completed during 1953. A fee of $475.00 per vessel was charged by Maritime Associates for this work, and the total fee for the ten vessels ($4,750.00) has been charged as an additional post delivery overhead expense in the recomputation of the amount of "additional charter hire" due the Maritime Administration in Schedules 1 and 2 herewith.

CONCLUSION

As a result of the recomputation of the "additional charter hire" to reflect the additional operating expenses and additional post redelivery overhead expenses outlined above, a net amount of $57,663.25 is shown by Schedules 1 and 2 herewith to have been overpaid, and to be now due Mystic Steamship Division from the Maritime Administration.

Boston, Mass., December 7, 1953.

[Accounting enclosed with above letter and certificates, calculating secondary contingent hire in accordance with charter Clause 13, is not reproduced.]

VOLUME II. EXHIBIT S

[Maritime Telegram of August 15, 1947]

U. S. MARITIME COMMISSION
Secretary's Office
(Operating Contracts Division)

August 15, 1947.

BOOK TELEGRAM

TO ATTACHED BAREBOAT CHARTERERS OF MARITIME COMMISSION VESSELS

THE USE OF ANY AND ALL VESSELS CHARTERED TO YOUR COMPANY PURSUANT TO THE PROVISIONS OF SHIPSALESDEMISE 303 IS HEREBY TERMINATED AS FOLLOWS:

WITH RESPECT TO VESSELS WHOSE VOYAGES TERMINATE ON OR AFTER AUGUST 31, 1947 THIS TELEGRAM SHALL BE DEEMED TO BE THE OWNER'S FIFTEEN DAYS NOTICE OF CANCELLATION PURSUANT TO CLAUSE 14 OF PART II OF THE CHARTER:

WITH RESPECT TO VESSELS WHOSE VOYAGES HAVE TERMINATED OR WILL TERMINATE PRIOR TO AUGUST 31, 1947 THIS TELEGRAM WILL ALSO BE DEEMED TO BE THE OWNER'S FIFTEEN DAYS NOTICE OF CANCELLATION PURSUANT TO SAID CLAUSE 14 AND/OR CLAUSE C(2) OF PART I.

YOU WILL BE GIVEN OPPORTUNITY TO CONTINUE THE USE OF VESSELS UNDER CHARTER PURSUANT TO NEW TERMS AND CONDITIONS TO BE ANNOUNCED WITHIN THE NEXT FEW DAYS.

IF WITHIN SEVEN DAYS FROM DATE HEREOF YOU ADVISE AS TO THOSE VESSELS WHICH ARE ENGAGED SOLELY IN DOMESTIC TRADE, THE COMMISSION WILL EXCEPT SUCH VESSELS FROM THIS NOTICE.

(signed) A. J. WILLIAMS,
Secretary United States Maritime Commission.

VOLUME II. - EXHIBIT T

[Maritime Telegram of August 20, 1947]

U. S. MARITIME COMMISSION

Operations

Washington, D.C.

August 20, 1947.

BOOK TELEGRAM

TO ATTACHED BAREBOAT CHARTERERS OF MARITIME COMMISSION VESSELS

PURSUANT TO THE COMMISSION NOTICE OF AUGUST 15, 1947, AS TO THE TERMINATION OF THE USE OF ALL VESSELS CHARTERED TO YOUR COMPANY SUBJECT TO THE PROVISIONS OF SHIPSALESDEMISE 303, THE U.S. MARITIME COMMISSION TODAY AUTHORIZED AN ADDENDUM TO ITS BAREBOAT CHARTER AGREEMENT FOR WARBUILT VESSELS, "SHIPSALESDEMISE 303," EFFECTIVE AS OF SEPTEMBER 1, 1947, PROVIDING SUBSTANTIALLY AS FOLLOWS:

1. RATES OF BASIC AND ADDITIONAL CHARTER HIRE FOR FOREIGN TRADE REMAIN UNCHANGED STOP
2. PERIOD OF ABOUT SIX MONTHS, BUT NO VOYAGES TO BE COMMENCED AFTER FEBRUARY 29, 1948, SUBJECT TO TERMINATION AS TO ANY VESSELS ON FIFTEEN DAYS' NOTICE BY EITHER PARTY TO BE GIVEN AFTER A PERIOD OF SIXTY DAYS FROM THE DATE WHEN THE VESSEL BECOMES SUBJECT TO THE PROVISIONS OF THE ADDENDUM STOP
3. THE PAYMENT OF ADDITIONAL CHARTER HIRE PURSUANT TO CLAUSE 13 SHALL BE COMPUTED SEPARATELY FOR THOSE VOYAGES COMMENCED PRIOR TO SEPTEMBER 1, 1947, AND THOSE WHICH COMMENCE UNDER THE ADDENDUM TO THE CHARTER AGREEMENT HEREIN AUTHORIZED, WITH THE UNDERSTANDING THAT THE MARITIME COMMISSION MAY PERMIT CHARTERERS TO ESTABLISH RESERVES FOR REPAIR EXPENSES AND EXPENSES USUALLY COVERED BY P & I INSURANCE STOP

4. IN THE EVENT ANY CHARTERER HAS REDELIVERED OR DOES REDELIVER ANY VESSEL WHICH ON OR AFTER AUGUST 15, 1947, WAS OR SHALL BE UNDER SHIPSALESDEMISE 303 AND SUBSEQUENT TO SUCH REDELIVERY APPLIES FOR THE CHARTER OF ANOTHER VESSEL THEREUNDER, THE CHARTERER MUST AGREE TO ASSURE THE COST OF DELIVERY OF SUCH VESSEL FROM LAYUP OR OTHERWISE (EXCLUDING THE COST OF REPAIRS) AND THE COST OF REDELIVERY OF SUCH VESSEL (INCLUDING COST OF PLACING VESSEL IN LAYUP) UPON TERMINATION OF THE CHARTER AT A POINT DESIGNATED BY THE OWNER, AND SUCH ASSUMED COSTS (EXCLUSIVE OF REDELIVERY REPAIRS) SHALL NOT BE TAKEN INTO ACCOUNT IN DETERMINING ADDITIONAL CHARTER HIRE PURSUANT TO CLAUSE 13 OF THE CHARTER AGREEMENT STOP

5. IN THE EVENT A CHARTERER APPLIES FOR THE CHARTER OF A VESSEL OR VESSELS IN ADDITION TO THOSE WHICH ON AUGUST 15, 1947, WERE UNDER SHIPSALESDEMISE 303 (AND HAS NOT REDELIVERED ANY VESSEL OR VESSELS SUBSEQUENT TO AUGUST 15, 1947) THE CHARTERER MUST AGREE TO PAY THE COST OF DELIVERY OF SUCH ADDITIONAL VESSEL OR VESSELS FROM LAYUP OR OTHERWISE (EXCLUSIVE OF REPAIRS) AND THE COST OF REDELIVERY (INCLUDING THE COST OF PLACING VESSEL IN LAYUP) OF SUCH VESSEL UPON TERMINATION OF THE CHARTER AT A POINT DESIGNATED BY THE OWNER, AND SUCH COSTS SHALL BE CONSIDERED AS VOYAGE EXPENSE IN DETERMINING ADDITIONAL CHARTER HIRE PURSUANT TO CLAUSE 13 OF THE CHARTER AGREEMENT STOP

PLEASE ADVICE NOT LATER THAN AUGUST 27, 1947, IF YOU ACCEPT THE ADDENDUM AS SPECIFIED HEREIN. UPON WRITTEN NOTICE BEING GIVEN OF SUCH ACCEPTANCE, YOU ARE AUTHORIZED TO CONTINUE THE USE OF ANY VESSELS NOW CHARTERED TO YOU PURSUANT TO SHIPSALESDEMISE 303 UNDER THE PRESENT TERMS AND CONDITIONS AS TO ANY APPROVED VOYAGES

COMMENCING PRIOR TO SEPTEMBER 1, 1947, BUT THE VOYAGES OF ANY NEW VESSEL ALLOCATIONS AFTER AUGUST 20, 1947, SHALL BE UNDER THE TERMS AND CONDITIONS OF THE ADDENDUM. IF SUCH WRITTEN NOTICE OF ACCEPTANCE OF THE ADDENDUM IS NOT RECEIVED BY THE COMMISSION ON OR BEFORE AUGUST 27, 1947 ALL VESSELS, PURSUANT TO THE PROVISIONS OF SHIPSALESDEMISE 303, SHALL BE REDELIVERED IN ACCORDANCE WITH THE TERMS OF SUCH CHARTER UPON COMPLETION OF APPROVED VOYAGES COMMENCED PRIOR TO SEPTEMBER 1, 1947.

A. J. WILLIAMS,
Secretary U.S. Maritime Commission,
PASULLIVAN, *mc*

VOLUME II. EXHIBIT U

[Eastern's telegram of August 25, 1947]

WU34 PD

WUX BOSTON MASS AUG 25 307P 1947

A. J. WILLIAMS, SECRETARY U S MARITIME COMMISSION.

RETEL YOURS OF AUGUST 15 AND AUGUST 20 WE ACCEPT ADDENDUM SPECIFIED YOUR WIRE OF AUGUST 20 AND HAVE ALL VESSELS NOW CHARTERED TO US PURSUANT TO SHIP SALES DEMISE CHARTER FORM 303 COMMITTED LOAD COAL DURING SEPTEMBER WITH ONE EXCEPTION WHICH VESSEL LOADS EARLY OCTOBER.

R C GOODWIN V P MYSTIC STEAMSHIP DIV E G & FASS.

15 20 20 303

VOLUME II. EXHIBIT V

[Maritime's telegram of August 27, 1947]

U. S. MARITIME COMMISSION
Operations
Washington, D.C.

August 27, 1947.

BOOK TELEGRAM

TO ALL CHARTERERS IN OFFSHORE TRADES

PER LIST ATTACHED

REFERRING OUR TELEGRAM AUGUST 20 COVERING VESSELS CHARTERED FOR OPERATION IN FOREIGN TRADE, AND ANSWERING CERTAIN INQUIRIES RECEIVED, YOUR WRITTEN ACCEPTANCE MAY COVER ALL VESSELS NOW UNDER CHARTER OR ANY LESSER NUMBER PROVIDED EACH OF SUCH LESSER NUMBER OF VESSELS ARE NAMED STOP WITH RESPECT TO THOSE VESSELS AS TO WHICH YOU DO NOT ACCEPT THE ADDENDUM, NOTICE OF TERMINATION PREVIOUSLY GIVEN STANDS, AND ANY FUTURE UTILIZATION OF SUCH VESSELS, IF APPROVED BY THE COMMISSION, WILL BE SUBJECT TO PARAGRAPHS FOUR OR FIVE OF SAID AUGUST 20 TELEGRAM WHICHEVER MAY BE APPLICABLE STOP AS TO THOSE VESSELS INCLUDED IN YOUR ACCEPTANCE, OUR NOTICE OF TERMINATION GIVEN AUGUST 15, 1947, SHALL BE CONSIDERED WITHDRAWN AND FUTURE TERMINATION SHALL BE IN ACCORDANCE WITH ADDENDUM TERMS STOP IN ACCORDANCE WITH AUGUST 20 TELEGRAM, YOUR ACCEPTANCE MUST BE RECEIVED BY THE COMMISSION NOT LATER THAN MIDNIGHT AUGUST 27, 1947.

/s/ A. J. WILLIAMS,
Secretary U. S. Maritime Commission.

VOLUME II. EXHIBIT E8.

[Affidavit of William M. Brady]

[Caption omitted]

AFFIDAVIT OF WILLIAM M. BRADY, ESQUIRE

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, SS:

WILLIAM M. BRADY, being duly sworn, deposes and says:

1. I am Associate Counsel of Eastern Gas and Fuel Associates, a trust organized under the laws of the State of Massachusetts (hereinafter called the "Company"). I have been associated with the Company for fifteen years, and have assisted in the preparation of the Company's defense to the cross-libel of the United States in the above action. In this connection, I have supervised a search of the files of the Company for documentary material having a bearing on the operation of the vessels bareboat-chartered from the United States Maritime Commission under Charter Contract No. MCc-41881 during the period 1946-1947.

2. Attached to this affidavit, as *Exhibit A*, are photostats of sixteen pages from the Company's voyage charter record book, which set forth the details of all thirty-seven foreign voyages made by vessels chartered from the former Maritime Commission in 1946 and 1947, including the vessel name, the charterer (foreign governments and United States Army), the type of cargo carried, the ports of loading and discharge, and freight rates. The entries contained on these sheets were made in the regular course of business by Company employees, concurrently with the occurrences therein recorded.

3. Attached hereto, as *Exhibit B*, are representative clauses copied from such of the voyage charters of these vessels as are still in the files of the Company, showing that approval of the Maritime Commission was required to be obtained as to the use of these vessels. The files contain thirty-one of the thirty-seven charters, and these charters

will be made available to Government counsel for inspection, if requested.

4. Attached to this affidavit, as *Exhibit C*, are copies of such letters and telegrams as we have been able to find in our remaining available files, showing that the Company obtained the approval of the Martime Commission to the terms of the voyage charters of these vessels, including the charterers, the type of cargo, the ports to which carried, the freight rates, and other terms for such transportation.

5. The records of the Company show that on January 29, 1960, the detailed chartering records applicable to four of the vessels—the SS WILLIAM MCKINLEY, SS WILLIAM BEVAN, SS WILLIAM KENDRICK, and the SS WASHINGTON IRVING—were destroyed as being no longer required. This destruction occurred prior to May 10, 1960, when the United States served its cross-libel, asserting for the first time its large cross-claim exceeding $1,000,000 against the Company. The files which were destroyed contained complete information of the type described in paragraphs 3 and 4 above as to the four vessels, and their destruction after fourteen years (but before the Government's cross-claim was filed) results in partial records only being available for the Company's defense of the claim. In respect of three of the vessels—the SS ISAAC SHARPLESS, SS ANDREW STEVENSON, and the SS JAMES BOWDOIN—the files of the Company are incomplete. The records do not show conclusively that the files have been destroyed; they have not, however, been found.

WILLIAM M. BRADY.

Subscribed and sworn to before me this 21st day of November, 1960.

JOHN A. GAGE,
Notary Public;

JOHN A. GAGE. My Commission expires March 18, 1961.

[Exhibit A to above affidavit (Eastern's Voyage Charter Record Book) appears in full as Exhibit E9, Volume II,

to record. It is not reproduced herein, but lists a total of 37 voyages made by Eastern for the following charterers:

No. of Voyages	*Charterer*
2	U.S. Army.
17	French Government.
5	Ministry of Food, London, England.
1	Lloyd Brasiliero.
4	Italian Government.
1	C. H. Sprague & Son.
3	Belgian Government.
3	Dutch Government.
1	Belgian Economic Mission.]

[Exhibit B to the above affidavit appears as Exhibit E10, Volume II, to record. It is reproduced below in its entirety.]

Exhibit B

Typical Clauses Contained in Voyage Charter Parties Relating to Maritime Commission Approval of Charter Terms.

Type A (Contained in at least three charters).

"This charter is subject approval of United States Maritime Commission."

Type B (In at least three charters).

"This contract is subject to the approval of the United States Maritime Commission.

* * * * *

"It is understood that the Owner of this vessel (U.S.A.) has the right under Clause 14 of the Bareboat Charter existing between the Owner of the vessel and Eastern Gas & Fuel Associates, Bareboat Chartered Owners, to terminate the period of use of the vessel by giving written notice to the Bareboat Chartered Owners at least fifteen days prior to the termination of any voyage. Should the Owner of the vessel (U.S.A.) exercise this or any other prerogative it may have under said Bareboat Charter which might frustrate the performance of this Charter, then this Charterparty is to be cancelled without penalty or liability to any of the parties hereto."

Type C (In the two charters to the United States Army).

"C. Price Adjustment for Changes in United States Maritime Commission Charter Hire Rates. If the vessel is bareboat chartered from the United States Maritime Commission, the per diem rates of compensation set out in Article 2 hereof are based upon the Owner paying to the United States Maritime Commission a basic charter hire (without regard to the additional charter hire payable pursuant to the Merchant

Ship Sales Act of 1946) computed on the basis of fifteen per cent per annum of the estimated statutory sales price for any vessels chartered from the Maritime Commission. In the event that such basic charter hire is greater or less than fifteen per cent per annum of the estimated statutory sales price for any such vessel, the rate of compensation specified in Article 2 hereof will be adjusted in the amount that such basic charter hire is greater or less than fifteen per cent per annum on the estimated statutory sales price."

Type D (In at least one charter).

"The voyage under this charter is subject to the approval of the United States Maritime Commission."

Type E (In at least five charters).

"All terms, conditions and exceptions of bareboat charter between United States Maritime Commission and Mystic Steamship Division, Eastern Gas & Fuel Associates to have precedence over any conflicting terms or conditions of this charter party."

Type F (In at least one charter)

"27. This contract is subject to the approval of the U.S. Maritime Commission."

* * * * *

"It is understood that the owners of the vessel (United States and/or Maritime Commission) has the right under Clause 14 of the bareboat charter existing between the owners of the vessel and Mystic Steamship Division, Eastern Gas & Fuel Associates, Bareboat Chartered Owner to terminate the period of use of the vessel by giving written notice to the bareboat charterers at least 15 days prior to the termination of any voyage. Should the owner of the vessel exercise this prerogative or any other prerogatives it may have under the

bareboat charter existing with MYSTIC STEAMSHIP DIVISION, Eastern Gas & Fuel Associates, that might frustrate the performance of this charter, then this charter to be cancelled without penalty or liability on the part of any of the parties hereto. The Bareboat Chartered Owners shall have the option of substituting a similar Liberty steamer in a similar position, if this charter is so cancelled."

Type G (In at least three charters)

"2. The voyage under this charter is subject to the approval of the United States Maritime Commission.

. . . . . .

"11. If the United States Maritime Commission cancels the bareboat charterparty on the above steamer it is understood that this charter party is to be cancelled without penalty to either party."

Type H (In at least two charters)

"This Charter Party is subject to approval by the United States Maritime Commission and the provisions of the Bare Boat Charter of said steamer from the United States Maritime Commission to the Chartered Owner and to the provisions of U.S.M.C. General Order 60, supplement 5, part II, Clause 17."

Type I (In at least two charters)

"25. This Charter is subject to the approval of the United States Maritime Commission.

. . . . . .

"29. It is understood that the United States Maritime Commission has the right under bareboat charter existing (or to exist) between it and Mystic Steamship Division, Eastern Gas & Fuel Associates (Bareboat Charterer) to terminate the period of use of the vessel

by giving written notice to the bareboat charterer at least 15 days prior to the termination of any voyage. Should United States Maritime Commission exercise this prerogative or any other prerogative it may have under the bareboat charter existing with Mystic Steamship Division, Eastern Gas & Fuel Associates, that might frustrate the performance of this charter, then this charter to be cancelled without penalty or liability on the part of any of the parties hereto."

Type J (In at least one charter)

"29. It is understood that the Owners of the vessel (United States and/or Maritime Commission) have the right under Clause #14 of the bareboat charter existing between the Owner of the vessel and Mystic Steamship Division, Eastern Gas & Fuel Associates (Bareboat Charterers) to terminate the period of use of the vessel by giving written notice to the Bareboat Charterers at least 15 days prior to the termination of any voyage. Should the Owners of the vessel exercise this prerogative or any prerogative it may have under the bareboat charter existing with Mystic Steamship Division, Eastern Gas & Fuel Associates, that might frustrate the performance of this charter, then this charter to be cancelled without penalty or liability on the part of any of the parties hereto. The Bareboat Chartered Owner shall have the option of substituting a similar Liberty steamer in a similar position if this charter is so cancelled."

[Exhibit C to Brady affidavit (Volume II, Exhibit E11) is reproduced on pp. 91-96 of Eastern's Record Appendix.]

☆ U. S. GOVERNMENT PRINTING OFFICE 1962 860548 379

[fol. 245] Minute entry of argument and submission—November 7, 1962 (omitted in printing).

[fol. 246]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6035.

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, Libelants-Appellants,

v.

UNITED STATES OF AMERICA, Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[202 F. Supp. 297, 1962 A.M.C. 445; 1962 A.M.C. 1162]

Before Woodbury, Chief Judge, and Hartigan and Aldrich, Circuit Judges.

J. Franklin Fort, with whom James S. Eastham, William M. Brady, Israel Convisser and Kominers & Fort were on brief, for appellants.

Lawrence F. Ledebur, Attorney, Department of Justice, with whom Joseph D. Guilfoyle, Acting Assistant Attorney General, W. Arthur Garrity, Jr., United States Attorney, and Morton Hollander and Leavenworth Colby, Attorneys, Department of Justice, were on brief, for appellee.

OPINION OF THE COURT—January 8, 1963

ALDRICH, Circuit Judge. This libel and cross-libel in personam were brought to recover rental, or charter hire, alleged by libelants to have been overpaid, and by cross-libelant to have been underpaid, in connection with bareboat charters of merchant vessels by the former United

States Maritime Commission to Massachusetts Trustees of [fol. 247] Eastern Gas and Fuel Associates, hereinafter in the singular, Eastern. Basically the case raises the question of whether a profit-sharing lease, with a sliding scale calling for payments surpassing 50 per cent of the net voyage profits in excess of 10 per cent was unlawful. The district court held it was not, dismissed the libel, and rendered a money judgment in favor of the government on its cross-libel. Eastern appeals.

The charters were executed pursuant to the Merchant Ship Sales Act of 1946, hereinafter the 1946 Act, the most pertinent portion of which is section 5(b).

> "The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). . . ." 50 U.S.C. App. 1738(b).

In addition, subsection (c) of this section adopted certain provisions of the Merchant Marine Act of 1936, hereinafter the 1936 Act, the presently most important of which is section 709(a).

> "Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum [fol. 248] per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so

accounted for shall not be included in any calculation of cumulative net profit in subsequent years." 46 U.S.C. §1199(a).

Further provisions will be referred to later.

The original agreement, under which a number of vessels were chartered, was executed November 7, 1946. It provided for two separate types of rental. One, described as the "Basic Charter Hire" was a flat daily, sometimes called monthly, payment at the rate of 15 per cent per annum of the statutory sales price, which was the minimum amount required by section 5(b). A further paragraph, entitled "Additional Charter Hire," provided for the payment of "Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed not in excess of $100 per day—50%" (precisely in accordance with section 709(a)), but provided further that if the net voyage profit as defined exceeded $100 a day, 75 per cent of certain excess, and 90 per cent of any balance, hereinafter called the larger percentages, would be due. Eastern's operations until the termination of this charter on September 1, 1947, resulted in cumulative net voyage profits in excess of $100 per day. It paid the government some, but not all, of the larger percentages, and thereafter instituted this libel for their recovery. The government's cross-libel seeks payments of the balance.

In its brief Eastern asserts that the "'basic charter hire' was fixed by Maritime under section 5(b) of the 1946 act . . . [and the] 'additional charter hire' was a profit-[fol. 249] sharing arrangement *fixed under section 709(a)* of the Merchant Marine Act of 1936, . . ." (ital. suppl.) The charter makes no such specification. Eastern's assertion would seem to us, at first blush, merely an employment of the device of giving a dog a bad name and then hanging him for it. If in fact the only authorization for the profit-sharing arrangement was section 709(a), it would seem only too clear that the government's case must fall. Eastern's assertion that the Commission was in that position would seem merely an attempt to assume the point in issue. However, since other courts have taken precisely this approach, we must consider it.

In *American Export Lines, Inc.* v. *United States*, Ct. Cls., 1961, 290 F.2d 925, a case involving an apparently identical lease, the court said, at p. 927, "Section 5(b) of the Merchant Ship Sales Act of 1946 . . . provided for a basic charter hire[1] to be fixed at such rate as the Commission determined to be consistent with the policies of the Act, but at not less than 15 percent of the statutory sales price. . . ." 290 F.2d at 927. The court thereafter stated as one of the issues in the case, "Was the Commission authorized under section 709(a) of the Merchant Marine Act of 1936 to charge additional charter hire on a sliding scale of 50, 75 and 90 percent of the cumulative voyage profits . . . ?" It proceeded, "As a subsidiary question, [fol. 250] was the additional charter hire in excess of 50 per cent of the cumulative net voyage profits a part of the basic charter hire under section 5(b) of the Merchant Ship Sales Act of 1946?" 290 F.2d at 928.

The court concluded without difficulty, citing *Dichman, Wright & Pugh, Inc.* v. *United States*, D.C.S.D.N.Y., 1956, 144 F. Supp. 922, and *United States* v. *East Harbor Trading Corp.*, D.C.S.D.N.Y., 1960, 190 F. Supp. 245, that section 709(a) did not authorize the charging of more than 50 per cent of the net voyage profits. With this we quite agree, as did the court below. Then, with respect to the so-called subsidiary question, whether these larger amounts were inserted in the charter pursuant to the Commission's authority under section 5(b), the court said, "It may be the charter could have provided [this] . . . but the fact is

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[1] The words "basic charter hire" are contained in the charter, but are not to be found in the statute. We note this fact because the court's use of these words constitutes, in our opinion, the first turn in a wrong road. These words may be a convenient and appropriate description for certain purposes, but, as will be developed later, the court uses them for purposes of statutory construction as if they had been contained in the statute itself.

While we are on this subject we might add that Eastern is content to adopt the argument based on these words. At the same time it is indignant with the government for making a counter-argument by substituting the phrase "minimum primary rental," decrying it as "super-market and department-store terminology." Thus it all depends on whose Oxford is gored.

that it did not so provide." Having thus decided that all that was done under section 5(b) was fixing 15 per cent as the "basic charter hire," the court concluded that the Commission had no further authority except what was conferred upon it by section 709(a), which section, as it had already decided, was insufficient to warrant the imposition of the larger amounts.

In *Dichman, Wright & Pugh, Inc.* v. *United States, supra*, cited by the court in *American Export Lines*, the court went further, in a dictum, conceding rather than stating as a "may be," that the larger amounts could legally have been imposed under section 5(b) had the Commission in fact done so. However, like *American Export*, the court then examined the agreement and concluded it had not done so. Finally,[1½] in *United States* v. *East Harbor Trading Corp., supra*, on a motion for summary judgment, the [fol. 251] court adopted this dictum of the *Dichman* case, but held that it was a question for further proceedings to determine which section of the statute the government had in fact proceeded under.[2]

In the present case the district court, after reviewing these earlier decisions, dismissed their approach as a "recondite technicality." We must agree. The charter in no way stated that one of its paragraphs was the product of, or was inserted by virtue of, one section of the statute and the other of the other. The charter was an integrated agreement that made no reference to the statute in any particular. The Commission had a single, overall obliga-

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[1½] After this opinion was written our attention was called to the case of *American Mail Line, Ltd.* v. *United States*, D.C. W.D. Wash., 12/19/62, also decided against the government. It adds nothing requiring separate discussion.

[2] These district court decisions may have constituted an empty victory for the shipping companies, as it was subsequently held that a number of pending suits for recovery of such payments allegedly illegally exacted were time-barred. *American-Foreign Steamship Corp.* v. *United States*, 2 Cir., 1961, 291 F.2d 598, *cert. den.* 368 U.S. 895. *But cf. American Mail Line, Ltd.* v. *United States, supra* n. 1½. We do not consider that question, however, because in the case at bar all payments have not been made.

tion to fix a charter hire.[3] It was but natural to place the formula for computing fixed, and the formula for computing contingent, rental in two separate paragraphs. Simply because the charter described the fixed charge as the "basic charter hire" and the Court of Claims' interpreted section 5(b) as "basic charter hire," and because the second paragraph was entitled "Additional Charter Hire" (in this case words used in section 709(a), but equally descriptive and applicable to the charter provision whether within section 709(a) or not) the court concluded that the Commission had acted outside of its authority, although [fol. 252] conceding it might have provided exactly this, so far as substance was concerned, had it used some other form of expression.

To say that the Commission stultified itself by its choice of format is to elevate semantics above substance. Appellate courts frequently affirm district courts for being right, but for the wrong reason, and we may assume that district courts prefer this to not being affirmed at all. But the courts in the first two of these cases have reversed the Commission outright, and the third has questioned it not for reaching an impermissible result, nor because it gave a wrong reason, but merely because they chose to think that it had one. We cannot accept this approach. If a commission or other body is doing something it would be authorized to do, the presumption should be that it was acting within its authority. With all due respect, we think these courts have lost sight of this principle in a forest of pedagogy.

Eastern contends that it appears of record that the Commission in fact relied upon section 709(a), and that this fact vitiates the charters in any event. We do not so con-

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[3] It was to make contracts "in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." Section 207 of the 1936 Act, 46 U.S.C. 1117, incorporated into the 1946 Act by section 12 thereof, 50 U.S.C. App. 1745.

[4] 290 F.2d at 930-31, perhaps the best articulation of this point. Another argument is used in *Dichman, Wright & Pugh, Inc.* v. *United States, supra.*

strue the record.[5] But even if the Commission failed to make an exact analysis of the separate scope of each section of the act, Eastern's conclusion would not follow. The argument goes that such action would involve a determination that the fixed rate charged under section 5(b) was "consistent with the policies of [the] Act" as that section requires, which in turn would mean, Eastern says, that to charge anything further was inconsistent with the policies of the act. We do not subscribe to this reasoning. Rather, we assume the Commission determined that this particular [fol. 253] fixed charge was consistent provided it was accompanied by the contingent obligations elsewhere provided for. Eastern's argument would lead to the strange result that even if the Commission was authorized to conclude that the larger percentages could be appropriate charter hire in a proper case, when the Commission charged them it felt they were inappropriate. For this Eastern must carry a heavy burden of proof which we hold it has not met.

We accordingly conclude that the only question for decision is whether, in point of fact, the Commission had authority to make charters requiring the payment of more than 50 per cent of the net voyage profits. Because of their interrelationship we must consider both the 1936 and the 1946 acts. The 1936 Act covered a number of subjects. Subchapter VII, entitled Private Charter Operation, authorized the Commission to recondition old merchant vessels, and to construct new ones, in private yards by competitive bids. The Commission was then authorized to charter such vessels by competitive bidding, section 706, 46 U.S.C. §1196, or, in certain circumstances, without bidding, section 714, 46 U.S.C. §1204. In the case of competitive bids the Commission was to accept, subject to certain, here irrelevant, conditions, the "bidder proposing to pay the highest monthly charter hire." Section 707, 46 U.S.C. §1197. In all cases, the Commission was to demise "upon

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[5] Essentially Eastern's argument is that the Commission constantly used the phrase "additional charter hire," and since this phrase appears in section 709(a) that is what it must have been proceeding under. "Additional charter hire" is not such a phrase of art that it must be so identified. On the contrary, it is accurately descriptive of the contingent charges no matter what was its source.

an annual charter hire of not less than 5 per centum of the [statutorily determined] foreign cost . . . plus 3 1/2 per centum of the depreciated foreign cost." Sections 706, 714 (as amended), 46 U.S.C. §§1196, 1204. Also, in both cases there was applicable section 709(a), 46 U.S.C. §1199, entitled "Excess Profits," quoted *supra*, containing the 50 per cent profit obligation with which we are presently concerned.

In the 1946 Act there was substituted for competitive [fol. 254] bidding authority in the Commission to negotiate and set rates, subject to certain floors. Section 5(b), *supra*. The Commission was bound by another floor as the result of the incorporation of section 709(a) of the 1936 Act. Eastern's position is that this section also set a ceiling. It states, to the point of redundance, that "shall" when used in that section was a "mandatory" word, and that a requirement that an agreement "shall" contain a certain profit-sharing obligation makes it mandatory that it not contain a greater one. We may agree that in this case "shall" was used in a mandatory sense. It does not necessarily follow, as Eastern would have us believe, that there was an implicit mandatory negative.

We start with the familiar maxim, singularly not referred to by either party, *expressio* (or *inclusio*) *unius est exclusio alterius*. It is universally held that this maxim is a guide to construction, not a positive command. This is sufficient answer to Eastern's primary contention. Whether the specification of one matter means the exclusion of another is a matter of legislative intent for which one must look to the statute as a whole. *Springer* v. *Gov't of the Philippine Islands*, 1928, 277 U.S. 189; *City of New York* v. *Davis*, 2 Cir., 1925, 7 F.2d 566; *Simmons* v. *County of Suffolk*, 1918, 230 Mass. 236; *Esso Standard Oil Co.* v. *Holderman*, 1962, 75 N.J. Super. 455; *State ex rel. Curtis* v. *De Corps*, 1938, 134 Ohio St. 295; *Industrial Trust Co.* v. *Goldman*, 1937, 59 R.I. 11; *Attorney General of Utah* v. *Pomeroy*, 1937, 93 Utah 426; *Colquhoun* v. *Brooks*, 1888, 21 Q.B.D. 52, 65. An apt illustration that this is a matter of interpretation in each case may be found in *Attorney General of Utah* v. *Pomeroy*, *supra*. There the court pointed to the constitutional requirement that no person "shall be

convicted of Treason unless on the Testimony of two Witnesses . . ." Could this mean, the court asked, that the government's case would fail if there were three. So, here, [fol. 255] whether a provision that the government's price setting agent, the Commission, must provide for a recapture of 50 per cent of the net voyage profits in excess of 10 per cent means that it could not provide for more must be determined on the circumstances as a whole.

On the matter of legislative intent, some of Eastern's arguments are readily disposed of. It cites the proposition that if two statutes conflict, the specific must control the general. Hence, it says, section 5(b), which gives discretion to the Commission to fix rates, must be controlled by section 709(a), which limits that discretion in a certain particular. This does not bolster Eastern's point; it merely assumes it. In the same manner it says that section 5(b) limits the Commission's authority to charters which are "consistent with the policies of this Act," and that section 709(a) represents that policy. Again, this does not help us to construe section 709(a), but only takes us back to the starting point. The question remains, to what extent does section 709(a) seek to control section 5(b)?

Eastern says that if section 709(a) was not intended to set a ceiling as well as a floor, it should have contained the words "not less than." Statutes are not always drawn with such particularity, but may leave such matters to implication. Moreover, when a section is adopted bodily from some other act, care is not necessarily exercised to consider every difference which might arise under the changed conditions. We would agree with Eastern that in the 1936 Act, where section 709(a) was to be read in conjunction with section 706, section 709(a) was, as a practical matter, both a floor and a ceiling. The reason is obvious. Under section 707 competitive bids were to be judged by the "highest monthly charter hire." Hence no bidder would propose a higher profit-sharing provision than that required by section 709(a) because this would be to assume a burden to no purpose. By the same token the Commis- [fol. 256] sion would have no basis for imposing larger percentages. This was an understandable and desirable result. It might be difficult for the Commission, as a minis-

terial matter, to determine which was the "highest" bid if there were submissions varying not only in the fixed rate but in the contingency rate as well. When section 709(a) was inserted into an act which, subject to certain floors, gave the Commission itself power to set rates, it does not follow that it must be taken as reading a mandatory ceiling into that new procedure. The fact that a statute may point in a certain way when employed in one connection does not mean that it must be read exactly the same way in another connection. As we held in *Sherman* v. *Hamilton*, 1 Cir., 1961, 295 F.2d 516, *cert. den.* 369 U.S. 820, the answer depends upon the total context.[6]

[fol. 257] Eastern makes a further argument which really goes back to the 1936 Act, but is couched in terms of construing section 709(a) in conjunction with section 5(b) of the 1946 Act. In substance it is that under section 709(a) "net voyage profits" are determined by deducting "the

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[6] For this reason, even if Eastern's argument based upon the legislative history of section 709(a) in 1936 were sound, we would reject it. In fact it is not sound. Eastern states that a "proposal [for a sliding profit scale] was rejected, and Congress instead adopted the mandatory 50 percent profit sharing provision of section 709(a) . . . ." Due to omissions this statement is highly misleading. The proposed sliding scale (which set no rates, and hence would have permitted the Commission to set even as maxima very 2d Sess. (1936), a bill introduced by Senator Guffey. But the "remodest amounts) was contained in section 47 of S. 4110, 74th Cong., section" by the Senate Committee on Commerce, was not of the section 47 proposal, but, rather, of the entire bill, on the ground that government chartering was, per se, undesirable. The complaint 2d Sess. (1936). Subsequently, Senator Guffey prepared a new was that chartering was a give-away. See S. Rep. 1721, 74th Cong., version of his bill, in which section 47(a) contained the language now in section 709(a) of the act. See H.R. 8555, Amendments intended to be proposed by Senator Guffey, April 24 (Calendar day, May 4), 1936, 74th Cong., 2d Sess. Senator Guffey apparently never introduced this version of his bill into the Senate. Instead, he joined with Senators Gibson and Copeland in introducing a new bill which also included a section containing the language now in section 709(a) of the act. See 80 Cong. Rec. 9885 (1936); §709(a), H.R. 8555, Committee Print, June 13, 1936, 74th Cong., 2d Sess. This section was accepted without amendment. While this particular section may have been designed generally to meet "give-away" objections, we cannot draw any conclusions from this history helpful to Eastern.

charter hire reserved in the charter and . . . reasonable overhead . . . ." and that if the so-called larger percentages were in fact imposed under section 5(b) they would constitute part of "the charter hire reserved in the charter" and therefore would have to be so credited, with consequent confusion. It may be conceded that when section 709(a) was to be read in connection with charters made pursuant to section 706 of the 1936 Act, for reasons already discussed no larger percentages would be entailed because no bid would have included any such amounts. Possibly if Congress had been starting from scratch in 1946 it would not have devised exactly the section 709(a) language. But this does not mean that this language is inconsistent with the Commission's determination under section 5(b) to charge larger percentages. On the contrary, it seems to us that Eastern's argument is forced and unnatural. Section 709(a) required that every charter contain a provision for the payment of one half of the net profits (as therein defined) as "additional charter hire." At the same time it provided that "charter hire" was to be deducted to determine the profits. Hence, if Eastern wishes to be entirely literal, it would have to say that even as to the 50 per cent profit payment, this is part of the "charter hire" and so is ordered to be deducted. Obviously, such a strict reading of the language is absurd, for as a matter of common sense profits are not deducted in order to determine profits. Eastern naturally does not so read the language when it is considering the 50 per cent profit provision. It only seeks to do so when the percentages are larger. We do not [fol. 258] believe that such manufactured complications show the intent of Congress.

In sum, we find no specific single answer to the question of intent. We turn to more general matters. Eastern alleges that the policy of the 1946 Act was to assist the shipping industry. This may be conceded. The act had other purposes as well. The very fact that the Commission could in no case make a lease calling for less profit-sharing than is specified in section 709(a) shows that Congressional liberality was not unlimited. Even more uncompromising is the final clause in section 5(b) which provided that if the Commission in a particular case voted to charge less than the regular 15 per cent minimum provided in that

section, the charter hire should in no event be "less than the prevailing world market charter rates." It is difficult to regard this as an indication of general beneficence. The reason is clear. The dominant purpose of the 1946 Act was to sell vessels, not to charter them. At all times preference was to be given to applicants proposing to purchase. Section 7(a), 50 U.S.C. App. §1740(a). In fact a vessel could not be chartered at all until it had been advertised for sale for 60 days. Section 5(a), 50 U.S.C. App. §1738(a). Rather than trying to temper the wind to charterers, we must conclude that the important consideration was to avoid making charters too cheap. As the court said in *American President Lines, Ltd.* v. *United States*, 3 Cir., 1959, 265 F.2d 552, 553, quoting the district court, "[I]f the hire were made too attractive the pronounced policy to demise vessels outright would be thwarted. No prudent business man would purchase a commodity which could be leased at a comparatively more favorable price."[7] [fol. 259] This did not mean that charterers were to be taken advantage of. Congressional aid to shippers, tangibly expressed by subsidy provisions which could cushion losses to charterers as well as to owners, remained in effect. *Cf. United States* v. *Moore-McCormack Lines, Inc.*, 4 Cir., 1962, 308 F.2d 866. But certainly an intention to aid shippers did not mean that every provision in the act was to be construed against the government. We suggest that the very existence of the subsidy is a reason for not restricting the freedom given to the Commission under section 5(b) to negotiate for amply large initial charter rates.[8]

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[7] The phrase "consistent with the policies of this Act," which Eastern argues means "be kind to shippers," not only may refer to this other purpose, but there is evidence that in fact it was so intended. "Inasmuch as the policy of the measure is to put as many war-built vessels as possible into private ownership, the Commission is directed not to approve applications to charter unless such chartering is consistent with the policies of the Act." S. Rep. No. 807, 79th Cong. 1st Sess. 13 (1945).

[8] Actually, the government makes a persuasive argument that within the framework of this act it could be to the advantage of shippers to permit the Commission to charge more than 50 per cent of graduated profits, for if it could not do this it might feel called upon to demand a larger fixed fee. If a venture proved unsuccessful, the higher fixed rate could obviously be disastrous.

In section 5(b) Congress gave the Commission discretion to charge such rates as it felt appropriate, except that it established two floors. In section 709(a) it established another floor. These floors were specifically and unambiguously stated. Eastern's asserted ceiling exists, at best, only by implication. While we would be prepared to find such an implication if it seemed called for, we believe that limitations upon an otherwise general grant of power should not lightly be inferred. *Springer* v. *Gov't of the Philippine Islands, supra; cf. Esso Standard Oil Co.* v. *Holderman, supra; State ex rel. Curtis* v. *De Corps, supra.* Viewing this statute as a whole our disposition is against doing so. We accept the assumption, or conclusion, of the three cases initially discussed, and hold that the Commis- [fol. 260] sion was authorized to include the larger percentages in the charters.

Although we have reached this decision independently we do not wish, by silence, to deny the validity of certain other of the government contentions, particularly its point that in case of ambiguity it is appropriate to give weight to the view of the body entrusted to administer the act. *American Power & Light Co.* v. *S.E.C.*, 1 Cir., 1944, 141 F.2d 606, *aff'd*, 329 U.S. 90; *West Texas Utilities Co.* v. *N.L.R.B.*, D.C. Cir., 1950, 184 F.2d 233, *cert. den.* 341 U.S. 939; *North American Utility Securities Corp.* v. *Posen*, 2 Cir., 1949, 176 F.2d 194. One cannot fail to be impressed by the attention which the Commission gave to the desirability of charging the larger percentages and to the reasons which motivated it. However, we regard this as unnecessary to our decision.

The second aspect of the case is Eastern's contention that the Commission had no power to change the basis of accounting, and hence worsen its position under the charter, in September 1947, by terminating the charter and granting a new one.* Since the charter was terminable at will, this change was normally the Commission's right. *Gebhard* v. *Royce Aluminum Corp.*, 1 Cir., 1961, 296 F.2d 17.

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* Eastern says in reality the Commission rewrote the charter. Whether this is the substance of the matter makes no present difference.

Eastern's complaint is bottomed on the argument we have already considered, that section 709(a) was for the benefit of shippers and set a ceiling upon the Commission's authority with respect to profit-sharing agreements. This part of its case must fall with the other.

Finally, Eastern makes a separate contention with respect to two single voyage subcharters made by Eastern just before September 1, 1947 and consented to by the Commission pursuant to a clause in the charter requiring its consent to any subcharter or assignment. Eastern takes [fol. 261] the position that, irrespective of section 709(a), this assent prevented the Commission from terminating or modifying the charter with respect to these two vessels until these voyages had been completed. The provision requiring the Commission's assent was inserted for the government's benefit, not for Eastern's. Indeed, Eastern agrees that the Commission might have terminated the charter outright on September 1 in spite of this assent. In that case Eastern would have been under no obligation to the subcharterers because their agreements contained a provision releasing Eastern in case of "frustration," and an outright termination of the charter would have been obvious frustration. Eastern's point is that the Commission's grant of a new charter, although on different terms, deprived it of this defense, and consequently the government should be held to the original charter. We cannot believe that the Commission's permitting Eastern to make a subcharter was intended as an enlargement of Eastern's rights.

Judgment will be entered affirming the judgment of the District Court.

[fol. 262]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

JUDGMENT—January 8, 1963

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

Roger A. Stinchfield, Clerk.

Approved: Peter Woodbury, Ch. J.

Thereafter, on January 23, 1963, mandate issued and the original papers were returned to the District Court.

[fol. 263] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 264]

SUPREME COURT OF THE UNITED STATES

No. —October Term, 1962

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, Petitioners,

vs.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—March 26, 1963

Upon Consideration of the application of counsel for petitioners,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 7, 1963.

Arthur J. Goldberg, Associate Justice of the Supreme Court of the United States.

Dated this 26th day of March, 1963.

[fol. 265]

SUPREME COURT OF THE UNITED STATES

No. 137—October Term, 1963

MASSACHUSETTS' TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, Petitioners,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—October 14, 1963

The petition herein for a writ of certiorari to the United State Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
MAY 16 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, *Petitioners*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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May 16, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, *Petitioners*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on January 8, 1963.

OPINIONS BELOW

The opinions of the district court (East. A. 5-25, 26-33)[1] are reported at 202 F. Supp. 297 and 210 F.

[1] Nine copies of the record appendices printed for the use of the court of appeals have been filed in this Court, together with one copy of the supplemental proceedings in the court below. The pages in petitioners' record appendix (white volume) are referred to in this petition as "(East. A. ,)."

Supp. 822. The opinion of the court of appeals is reported at 312 F. 2d 214 and is set forth in Appendix A, pp. A1-A16 *infra*.

JURISDICTION

The judgment of the court of appeals was entered January 8, 1963. On March 26, 1963, the time to file this petition was extended by order of Mr. Justice Goldberg to and including June 7, 1963. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Petitioners bareboat chartered vessels from the former Maritime Commission under Section 5 of the Merchant Ship Sales Act of 1946. That section made applicable to such charters section 709(a) of the Merchant Marine Act, 1936, which specified a 50 percent division with the Government of profits earned by the chartered vessels in excess of a return of 10 percent on capital employed in the operation of the vessels. Maritime promulgated a form of charter, which in substance rewrote section 709(a), to substitute a sliding scale of profit sharing up to 90 percent for the statutory 50 percent.

> The first question is whether Maritime was authorized to increase the 50 percent share of profits specified by section 709(a) to the sliding scale shares up to 90 percent.

2. In mid-1947, a sharp decline occurred in shipping and Maritime, foreseeing a reduction of its share of profits because of losses anticipated later in that year, notified the charterers of termination of the charters as of September 1, 1947, with the option of continua-

tion on condition that the results of voyages after September 1 be accounted for separately from voyages prior to that date,

The second question is whether this requirement, dividing the calendar year 1947 into two parts for profit sharing computations, violated the provision of section 709(a) prescribing "calendar year" accounting of "cumulative" net profits.

STATUTES INVOLVED

Sections 5(b) and 5(c) of the Merchant Ship Sales Act of 1946 (50 U.S.C. App. 1738(b) and (c)) provide:

> (b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). . . . [R]ates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rate for similar vessels for similar use as determined by the Commission.
>
> (c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section.

Section 709(a) of the Merchant Marine Act, 1936 (46 U.S.C. 1199) provides:

> Sec. 709. (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any

calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

These statutory provisions, and the regulations and charter clauses modeled thereon, are set forth in parallel form on the foldout sheet attached to this petition as Appendix B.

STATEMENT

A. The Charters

1. The Merchant Ship Sales Act of 1946, approved March 8, 1946, directed the Maritime Commission to terminate government operation of the war-built merchant fleet after World War II, and set forth the terms upon which government vessels were to be sold or chartered to private steamship companies. The purpose of the Act was to rehabilitate the private merchant marine whose operations had been disrupted, and fleets decimated, by war losses and requisition.

2. In mid-August 1946, Maritime acting under Section 5 of the 1946 Act adopted a standard form of Ship Sales Act charter (called "SHIPSALESDEMISE 303"). In this charter the "basic charter hire" rate was fixed pursuant to Section 5(b), *supra*, at 15 percent per an-

num of the statutory sales price of the vessels (East. A. 70). In fixing "additional charter hire" referred to in Section 709(a), *supra*, Maritime substituted sliding scale rates of 50, 75 and 90 percent for the 50 percent specified in that section. The 50 percent rate had been incorporated in the earlier WSA form of charter[2] employed during the interim period from March to August 1946 (App. B *infra*; East. A. 76).

3. The charterers protested the sliding scale of "additional charter hire" rates because they conflicted with section 709(a) and, following these protests, but before execution of the charters, Maritime added a clause which provided that profit sharing payments would be "preliminary". Martime also issued regulations and instructions providing that the making of payments would not "prejudice the rights of either [party] under the applicable bareboat charter agreement or otherwise."[3]

4. In general, the charterers, including petitioners, sustained losses in late 1946 from the operation of the vessels under the charters. On voyages during the first part of 1947 they made profits sufficient to require profit sharing payments in excess of 50 percent. The

[2] The War Shipping Administration was authorized to charter vessels by Public Law 101, 77th Cong., 1st Sess., Act of June 6, 1941 (55 Stat. 243, 50 U.S.C. App. 1273(a)).

[3] East. A. 11-13; App. B, quoting 46 C.F.R. 299.31(k) and 299.56(b)(5); 46 C.F.R. 299.39(a), (b); 46 C.F.R. 299.40(c). The industry protests, and the amendment of the charters to reserve the charterers' right, are summarized in the *en banc* decision of the Court of Appeals for the Second Circuit in *American Foreign Steamship Corp.* v. *United States*, 291 F. 2d 598, *cert. denied*, 368 U.S. 895 (1961). See especially the majority opinion of Judge Smith, 291 F. 2d at 602, and the dissent of Judges Friendly and Moore, *id.* at 613-615.

charter market then declined sharply, and Maritime, concerned about losing its excessive shares of profits, advised the charterers, including petitioners, on August 15, 1947, that their charters would be terminated as of September 1, 1947, but could be extended on condition that the losses from voyages after September 1 be accounted for separately from the profits of voyages commenced before that time.[4]

5. The effect, in petitioners' case, of the sliding scale and split year accounting is to allocate to the Government $516,000 of profits for the first eight months of 1947 and to petitioners $196,000 for that period. For the last four months of 1947, however, the vessels operated at a loss of $246,000 which, because of the divided accounting in 1947, did not affect the share of profits allocable to the Government but converted petitioners' profits from the earlier period into an overall loss of $50,000. The net result is that if the Government's position is sustained on the two disputed issues,

[4] Maritime's reason for threatening to terminate the charters is recited in its annual report to Congress for the fiscal year ended June 30, 1948 (p. 14), as follows:

> This action was designed to require the charterer to carry on all operations after August 31, 1947, without off-setting future losses against additional charter hire due the Government, from voyage profits for the prior period.

Petitioners were bound under subcharters for voyages with at least two of the vessels after September 1, 1947. These subcharters had been approved in advance by Maritime for performance after September 1, 1947 (East. A. 30-31). The subcharters contained a clause permitting petitioners to escape if Maritime terminated the bareboat charters; but Maritime's action, continuing the bareboat charters on condition that petitioners account separately for the two portions of the calendar year, did not relieve petitioners of their obligation under the subcharters, because the escape clause did not apply in case of conditional continuation of the bareboat charter.

petitioners will suffer a loss on the charter while the Government will receive not only $516,000 of the profits for the first eight months of 1947 but also more than $700,000 of basic charter hire collected for the use of the vessels over the period of the charter (East. A. 109, 115).

6. After the "final audit" of operations petitioners brought an action under the reservation of rights clause of the charter to recover hire overpaid on their theories of the proper construction of the statutes, and the Government counterclaimed for alleged unpaid amounts (East. A. 11-13).

B. The Decision Below

The court below decided both the sliding scale and the split accounting issues in favor of the Government, and affirmed the judgment against petitioners for the unpaid profit sharing hire. It held that the general provisions of section 5(b) of the 1946 Act authorizing charter hire "consistent with the policies of this Act" permitted Maritime to modify the specific fifty-fifty profit sharing provision and the calendar year accounting provision of section 709(a) (App. A 14 and A 15). It construed section 709(a) as fixing a minimum profit sharing formula in favor of the Government for purposes of the 1946 Act, although apparently recognizing that it fixed a maximum and minimum for purposes of the 1936 Act. It relied for this holding upon the "dominant purpose of the 1946 Act, . . . to sell vessels not to charter them, . . ." and said that "the important consideration was to avoid making charters too cheap." (App. A 13)

The court below also held it to be immaterial that Maritime had relied upon section 709(a) in fixing

the profit sharing in excess of 50 percent. It found such misreliance to be merely a matter of form and not substance. It rejected the contention of petitioners that section 709(a) fixed the profit sharing formula and thus controlled this feature of the charters to the exclusion of section 5(b); and that Maritime's misreliance involved a matter of material substance, not merely a matter of form.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With a Decision of the Court of Claims and With Several Other Decisions

The court below expressly recognized the conflict on the profit sharing issue between its decision and the decisions of (a) the Court of Claims in *American Export Lines, Inc.* v. *United States*, 290 F. 2d 925 (1961), (b) the District Court for the Southern District of New York in *Dichmann, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (1956), and (c) the District Court for the Western District of Washington in *American Mail Line, Ltd.* v. *United States*, 213 F. Supp. 152 (1962).

These courts held that if Maritime invoked section 709(a), its action was unauthorized whether or not section 5(b) might have authorized it if invoked.[5] The Court of Claims in *American Export Lines* and the district court in *American Mail Line* (after a trial) found as a fact that Maritime had relied upon section 709(a), and it is submitted that this is conclusively supported by the record (App. B). The view of the

[5] This was also the holding of *United States* v. *East Harbor Trading Corp.*, 190 F. Supp. 245, 249 (1960), but the court there left open for trial the issue of whether Maritime in fact relied upon section 709(a) or upon section 5(b).

court below, that section 5(b) may be invoked retroactively to justify action taken in attempted reliance upon section 709(a), violates the principle that the courts may not supply a rationale for agency action which that agency never considered. *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962); *Bell* v. *United States*, 366 U.S. 393, 412 (1961); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87, 93-94 (1943); *United States* v. *Morgan*, 313 U.S. 409, 421-22 (1941).

The views expressed by Judges Friendly and Moore of the Court of Appeals for the Second Circuit in the litigation finally reported as *American-Foreign Steamship Corp.* v. *United States*, 291 F. 2d 598, 613, *cert. denied*, 368 U.S. 895 (1961), and the dictum of the Second Circuit in *Sword Line* v. *United States*, 228 F. 2d 344, 346 (1955), *aff'd as to admiralty jurisdiction*, 351 U.S. 976 (1956) support the charterer's version of the facts and law, and also suggest a conflict. On the other hand, the decision below has recently been treated as authoritative in *United States* v. *Eastport Steamship Corp.* (S.D.N.Y.—April 26, 1963, unreported).

2. Litigation of Wide Scope is Affected

Between 1946 and 1951, Maritime collected approximately $395,000,000 as basic charter hire and $80,000,000 as profit sharing hire under the Ship Sales Act charters.[6] Of the latter amount, some $20,000,000 is involved in disputes turning on the questions presented

[6] Taken from pages 201a and 225a of affidavit of Charlie H. McDaniel, sworn to May 14, 1956, filed by the Government in *Smith-Johnson Steamship Corp.* v. *United States*, 142 F. Supp. 367 (Ct. Cl. 1956).

here. Part of this has been paid to Maritime and part is unpaid and subject to pending or potential suits by the Government.

Of the approximately ninety charterers involved in the chartering program, some thirty who were adversely affected have commenced suits throughout the United States which await authoritative decision of the split accounting and sliding scale issues. The Government has also recently filed libels against some of these charterers, and against others not heretofore involved in litigation, and their sureties, to recover unpaid amounts. The total number of suits and cross-suits now pending approximates sixty.

Starting in approximately 1956 Maritime also suspended all audits of the accountings of the charterers pending final decision of these issues by the courts.[7] In these accountings, the two disputed issues are in most cases interrelated, and a decision on the sliding scale issue alone will not permit completion of the accountings unless a decision is also reached on the split accounting issue. Authoritative decisions on both issues by this Court are therefore necessary not only to guide the lower courts but also to enable resumption of audits, already long delayed, and to permit settlement of the rights and liabilities of the charterers and their sureties.

The Government claims profit sharing hire from certain subsidized operators, and Maritime is required, by section 609 of the 1936 Act (46 U.S.C. 1179), to withhold subsidy in these circumstances. While there are presently no suits pending in the Court of Claims,

[7] Annual Report of the Federal Maritime Board/Maritime Administration for Fiscal Year Ended June 30, 1956, page 29, Report For Fiscal Year Ended June 30, 1957, page 30.

that court will have jurisdiction of suits for recovery of any such withholdings and the decision in *American Export Lines, Inc.* v. *United States, supra,* which conflicts with the decision below would be controlling.

Maritime currently is empowered to make bareboat charters under both the 1936 and 1946 Acts, and the question of its power to modify the profit sharing formula of section 709(a) under these acts will continue to exist until settled by this Court. Further, the Merchant Marine Act, 1936, contains many other mandatory provisions,[8] like section 709(a), which must be inserted in contracts and charters, and Maritime's authority to modify these sections under general provisions of the 1936 Act may be affected by the decision below.

3. The Decision Below Is Clearly Erroneous

The correctness of the decision below depends upon (i) whether the language of section 5(b), read *in pari materia* with section 709(a), may reasonably be construed to authorize the fixing of a profit sharing rate,

[8] In the 1936 Act, for example, are the following mandatory sections: section 505(b) ("No contract shall be made for the construction of any vessel under this Act unless the shipbuilder shall agree . . ."); section 506 ("Every owner of a vessel for which a construction-differential subsidy has been paid shall agree . . ."); section 603(b) ("Such contract shall provide that . . ."); section 606 ("Every contract for an operating-differential subsidy under this title shall provide . . ."); section 607(a) ("Every contract for an operating-differential subsidy made under authority of this title shall provided . . ."); section 709(b) ("Every charter shall contain a definition of the terms . . ."); section 712 ("Every charter shall provide . . ."); section 801 ("Every contract executed by the Commission under the provision of titles VI or VII of this Act shall contain provisions requiring . . ."); section 802 ("Every contract executed by the Commission under authority of title V of this Act shall provide . . .").

and (ii) whether section 709(a) may be construed as fixing a minimum in favor of the Government, and not a maximum and minimum.

(a) *The statutory language.* It is submitted that a normal reading of section 5(b) leads to the conclusion that that section was intended to authorize only a fixed bareboat rate based upon a percentage of the statutory sales price of the vessels chartered. It provides for charter hire "at such *rate* as the Commission determines to be consistent with the policies of this Act, . . ."[9] The only reference to rates in section 5(b) is to (i) a rate not less than 15 percent per annum of the statutory sales price, and (ii) a rate not less than the "world market rate." The section does not remotely suggest a rate based upon a percentage of profits.

Section 709(a), on the other hand, carefully defines a fifty-fifty profit sharing formula and requires such a clause in the charters. Not only does 709(a) specify the profit percentage, but it also fixes (a) the rate of return on capital, (b) the deduction of overhead and basic charter hire in computing profits to be shared, (c) the calendar year basis of accounting and (d) the cumulation of profits and losses from year to year. It seems elementary, therefore, that Congress intended section 709(a) to fix the formula in all these respects and that section 5(b) was not intended to authorize its alteration. It further seems clear that Maritime could not reach a determination under section 5(b) that profit sharing up to 90 percent was "consistent with the policies of this Act, . . ." when the same Act fixed 50 percent. Not only did section 709(a) not authorize

[9] Emphasis added in quotations unless otherwise indicated.

the sliding scale percentages, it affirmatively precluded these percentages.

It requires strong evidence to discard the rudimentary rule of statutory construction, that a specific statutory provision controls over a more general one,[10] and that statutes should be construed in such a way as not to render any portion thereof superfluous and meaningless.[11] The existence of the mandatory profit sharing in section 709(a) dispels any possible inference that the same concept was contemplated by section 5(b), which refers unambiguously to a rate based upon a percentage of statutory sales price.

(b) *There is no basis for construing section 709(a) differently in the 1946 Act than in the 1936 Act.* All of the courts which have considered this question, including apparently the one below, have concluded that, for purposes of the 1936 Act, section 709(a) fixes a minimum and a maximum profit sharing rate. But the court below has concluded that, for purposes of the 1946 Act, the section fixes a minimum only. This interpretation rests upon the assumption of an overriding policy of the 1946 Act, to sell vessels rather than

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[10] *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961); *Fourco Glass Co.* v. *Transmirra Prod. Corp.*, 352 U.S. 222, 228-29 (1957); *MacEvoy* v. *United States*, 322 U.S. 102, 107 (1944); *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1929); *Raleigh & G. R. Co.* v. *Reid*, 13 Wall. 269 (1872); *cf. Sword Line* v. *United States*, 228 F. 2d 344, 346 (2 Cir. 1955), *affirmed as to admiralty jurisdiction*, 351 U.S. 976 (1956).

[11] *Jarecki* v. *Searle & Co.*, 367 U.S. 303 (1961); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955); *Ex parte Public Nat. Bank*, 278 U.S. 101, 104 (1928); *Washington Market Co.* v. *Hoffman*, 101 U.S. 112-13 (1879); *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866, 873-74 (4 Cir. 1962).

to charter them, and a purpose to "avoid making charters too cheap." (App. A 13).

But there is nothing either in the statutory language or the legislative history to support this conclusion as to overriding policy. The statutory language of the 1936 and 1946 Acts shows closely parallel draftsmanship and purpose. Each act contains a substantially identical statement of policy, *i.e.*, to develop and expand the merchant marine in private hands (1936 Act—46 U.S.C. 1101; 1946 Act—50 U.S.C. App. 1735); each authorizes a minimum rate of charter hire of "not less than" a fixed percentage of a selling price independently established ("not less than" 8½[12] per centum per annum, 1936 Act—46 U.S.C. 1204; "not . . . less than 15 per centum per annum," 1946 Act—50 U.S.C. App. 1738(b)). The policy of each was to prefer the sale of vessels to charters,[13] but charters were to be made under each act to the extent required to build up the merchant marine (1936 Act—46 U.S.C. 1204; 1946 Act—50 U.S.C. App. 1740). Under each act, section 709(a) was a mandatory clause in the charters (46 U.S.C. 1199(a); 50 U.S.C. App. 1738(c)).

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[12] The 8½ percent floor was reduced to 7½ percent in June 1960. See 46 USCA 1204, Annotations.

[13] The legislative history of section 5(b) of the 1946 Act shows that the 15 percent rate was regarded by Congress as sufficiently high to encourage sales and discourage chartering. Basic charter hire in the early drafts of the 1946 Act was set at 8½ percent of the sales price, this percentage no doubt being taken directly from section 714 of the 1936 Act. Later drafts increased the rate, first to 12½ percent, and then to 15 percent. Congress noted that that rate might unduly hinder charters, and therefore provided in section 5(b) that it might be lowered under certain conditions. See H.R. 4486, 78th Cong., 2d Sess. (1944); S. Rep. No. 807, 79th Cong., 1st Sess. 13-14 (1945); H.R. Rep. No. 831, 79th Cong., 1st Sess. 8 (1945); 91 Cong. Rec. 11552, 11873 (1945); hearings before the House Committee on Merchant Marine and Fisheries on H.R. 1425, 79th Cong., 1st Sess. 468-70 (1945).

Section 706 of the 1936 Act (46 U.S.C. 1196) provided for basic rates fixed by competitive bids, but with a floor of 8½ percent of the price set by section 714 (46 U.S.C. 1204). And, if successful development of essential trade routes could not be accomplished with privately owned vessels, Maritime was authorized, by section 714, to construct new vessels and bareboat charter them, without competitive bids, but at negotiated rates of not less than 8½ percent of price.

Thus, both acts give authority to fix basic rates, subject to floors, and both require an equal division of profits. The court below was in error in finding a distinction between the two acts in this respect. Section 709(a) fixed a ceiling and a floor in the 1936 Act, and that section should be so interpreted in the 1946 Act.[14]

There is not the slightest suggestion in the legislative history that there was a different governmental policy in 1946 with respect to the American merchant marine than that which existed in 1936. Both acts sought to establish a healthy merchant marine, and this could not be accomplished by stifling the profit incentive. The 1936 Act sought to build up a failing industry necessary for national defense; the 1946 Act to restore an industry torn by World War II. If, in 1936, the profit sharing policy was 50 percent, it is only proper to conclude that Congress intended that policy to obtain when it placed section 709(a) in the 1946 Act.

(c) *The agency action taken under the statutes.* The court below concluded that the sliding scale could be justified under section 5(b) even though Maritime had

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[14] *United States* v. *Gertz*, 249 F. 2d 662, 665 (9 Cir. 1957); *United States* v. *Cooper Corp.*, 312 U.S. 600, 607-08 (1941); *Commissioner* v. *Ridgeway's Estate*, 291 F. 2d 257, 259 (3 Cir. 1961).

in fact relied upon section 709(a) in fixing the excess charge. While petitioners contend that this position is unsound, it may be helpful in considering the correctness of the decision below to relate the reasoning of Maritime in taking its action fixing the charter hire. This negates any intention of fixing profit sharing under section 5(b), and proves beyond doubt that Maritime rewrote section 709(a) because it thought the fifty-fifty profit sharing formula was not adequate for the Government.

The memoranda and minutes of Maritime reveal that that agency selected the 15 percent basic rate rather than some higher rate because (i) a decline was forecast in business for United States flag vessels owing to competition from vessels being sold under the 1946 Act for foreign flag operation (East. A. 48, 65-66); (ii) certain types of vessels would not justify a rate as high as 15 percent, and it was not practicable to set separate basic rates for different types of vessels in different trades (East. A. 55); and (iii) Maritime otherwise exercised control over profits by specifying the trades in which the vessels could be operated and the level of rates charged to shippers (East. A. 49, 77-90). Furthermore, and most important, (iv) Maritime actually considered raising the 15 percent rate, but refrained because the Government itself would be adversely affected financially.[15]

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[15] East. A. 97. As was said in *American Mail Line, supra* 213 F. Supp. at:

> Maritime considered increasing the basic charter hire rate of 15 percent per annum of the statutory sales price but did not do so because of protests from other government agencies, the Army and the State Department. These agencies had sub-time/voyage/space charters with various operators containing escalation clauses providing that if the operators' basic hire was increased by Maritime, the rate of hire specified in the subcharter would be adjusted accordingly.

The record also shows that Maritime, after fixing the basic rate at 15 percent, simply modified the profit sharing formula in the charters because it thought the share set by Congress was not adequate.[16]

The court below was also in error in finding that misreliance by Maritime upon section 709(a) was a matter of form and not substance. This conclusion overlooks not only the principle of the cases cited above at p. 9, but also the difference in scope and effect of the two statutory sections. Section 5(b) requires an administrative determination of consistency with the policies of the act—not present in section 709(a). Hence, if Maritime acted under section 709(a), the court below was not entitled to speculate that it might have acted in the same manner under section 5(b), without thereby substituting its judgment as to what Maritime might have determined would be consistent with the policies of the act.

Moreover, if the excess sliding scale share is justified by reliance upon section 5(b), accounting consequences

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[16] Maritime's memoranda and minutes repeatedly refer to an increase in the rate of "additional charter hire," a term found only in section 709(a). See the August 8, 1946, memorandum (East. A. 56):

> All of the Committee members, except one, agree that the *additional charter hire of 50% of the profits in excess of 10% of Capital necessarily employed in the business should be increased*. A minority of the Committee, however, feel that the revised percentage being recommended is too high.

A telegram to charterers was proposed, as follows (East. A. 63):

> 3. THE *ADDITIONAL CHARTER HIRE* PAYABLE TO THE OWNER WILL BE NINETY PERCENT OF THE NET VOYAGE PROFIT IN EXCESS OF THE TEN PER-CENT PER ANNUM ON CHARTERER'S CAPITAL NECESSARILY EMPLOYED *INSTEAD OF FIFTY PER-CENT AS HERETOFORE*.

follow under the provisions of section 709(a), which materially reduce the amount of profits payable to the Government (East. A. 40-42). This question should not have been brushed aside by the court below as a technicality.

(d) *Divided accounting in 1947.* Section 709(a) provides for additional charter hire, "whenever, *at the end of any calendar year* . . . . the cumulative net voyage profits" exceed the allowable 10 percent return. This language means that revenue and expense (upon which profit is based) and capital necessarily employed (upon which the 10 percent return is based) are to be computed on an annual—and more precisely, on a calendar year—basis. *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866 (4th Cir. 1962), *cert. denied* U.S. (1963), held that these annual results are to be cumulated or offset in computing profits to be divided with the Government.

The court below has sanctioned the practice of requiring accounting on a fractional year basis, so that profits for a portion of a year may be subjected to an additional charter hire requirement without reduction by losses suffered in other portions of the same year. This view reads out of section 709(a) the concept of cumulation as well as the requirement of calendar year accounting. And it conflicts with the purpose of these provisions, which is to enable vessel operators to protect themselves against the extreme business cycles regularly experienced in the shipping business, by permitting them to accumulate profits in prosperous periods to offset losses in depressed periods. *United States* v. *Moore-McCormack Lines, Inc., supra* at p. 872.

The court's decision on split accounting rests on the same error as that with respect to the rate of addi-

tional charter hire—its view that section 709(a), as incorporated in the 1946 Act, is a floor under but not a ceiling over the Government's share. As shown above, the language and legislative history of both acts indicate the contrary. This Court has often recognized that what a statute prohibits to be done directly may not be accomplished indirectly in the guise of a contract condition upon the grant of the benefits of the statute.[17] Even if there were a valid contract right to terminate the charters, not involving circumvention of statute, that right could not be exercised in bad faith in order to coerce modification of the original contract.[18]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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May 16, 1963

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[17] *Hunt Oil Company* v. *Federal Power Commission*, 300 F. 2d 429 (5th Cir. 1962); *Fidelity & D. Co.* v. *Tafoya*, 270 U.S. 426, 434 (1926); *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922); *Clapp* v. *United States*, 117 F. Supp. 576 (Ct. Cl. 1954), cert. denied, 348 U.S. 834 (1954); *Shay* v. *Agricultural Stab. & Conserv. State Com. for Ariz.*, 299 F. 2d 516, 522 (9 Cir. 1962).

[18] *Goltra* v. *Weeks*, 271 U.S. 536, 548 (1926); *United States* v. *Johnson*, 153 F. 2d 846, 849 (9 Cir. 1946); *United States* v. *Lennox Metal Manufacturing Co.*, 225 F. 2d 302, 318 (2 Cir. 1955).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6035.

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, *Libelants-Appellants*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

Appeal from the United States District Court
For the District of Massachusetts.

[202 F. Supp. 297, 1962 A.M.C. 445; 1962 A.M.C. 1162]

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

J. Franklin Fort, with whom *James S. Eastham*, *William M. Brady*, *Israel Convisser* and *Kominers & Fort* were on brief, for appellants.

Lawrence F. Ledebur, Attorney, Department of Justice, with whom *Joseph D. Guilfoyle*, Acting Assistant Attorney General, *W. Arthur Garrity, Jr.*, United States Attorney, and *Morton Hollander* and *Leavenworth Colby*, Attorneys, Department of Justice, were on brief, for appellee.

OPINION OF THE COURT.
January 8, 1963.

ALDRICH, *Circuit Judge*. This libel and cross-libel in personam were brought to recover rental, or charter hire, alleged by libelants to have been overpaid, and by cross-libelant to have been underpaid, in connection with bare-

boat charters of merchant vessels by the former United States Maritime Commission to Massachusetts Trustees of Eastern Gas and Fuel Associates, hereinafter in the singular, Eastern. Basically the case raises the question of whether a profit-sharing lease, with a sliding scale calling for payments surpassing 50 per cent of the net voyage profits in excess of 10 per cent was unlawful. The district court held it was not, dismissed the libel, and rendered a money judgment in favor of the government on its cross-libel. Eastern appeals.

The charters were executed pursuant to the Merchant Ship Sales Act of 1946, hereinafter the 1946 Act, the most pertinent portion of which is section 5(b).

> "The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). . . ." 50 U.S.C. App. 1738(b).

In addition, subsection (c) of this section adopted certain provisions of the Merchant Marine Act of 1936, hereinafter the 1936 Act, the presently most important of which is section 709(a).

> "Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charter's fair and reasonable overhead expenses applicable to operation of the chartered vessel(s) shall exceed 10 per centum per annum on the charterer's capital neces-

sarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years." 46 U.S.C. § 1199(a).

Further provisions will be referred to later.

The original agreement, under which a number of vessels were chartered, was executed November 7, 1946. It provided for two separate types of rental. One, described as the "Basic Charter Hire" was a flat daily, sometimes called monthly, payment at the rate of 15 per cent per annum of the statutory sales price, which was the minimum amount required by section 5(b). A further paragraph, entitled "Additional Charter Hire," provided for the payment of "Cumulative net voyage profit in excess of 10% per annum on capital necessarily employed not in excess of $100 per day—50%" (precisely in accordance with section 709(a), but provided further that if the net voyage profit as defined exceeded $100 a day, 75 per cent of certain excess, and 90 per cent of any balance, hereinafter called the larger percentages, would be due. Eastern's operations until the termination of this charter on September 1, 1947, resulted in cumulative net voyage profits in excess of $100 per day. It paid the government some, but not all, of the larger percentages, and thereafter instituted this libel for their recovery. The government's cross-libel seeks payments of the balance.

In its brief Eastern asserts that the "'basic charter hire' was fixed by Maritime under section 5(b) of the 1946 act . . . [and the] 'additional charter hire' was a profit-sharing arrangement *fixed under section 709(a)* of the Merchant Marine Act of 1936. . . ." (ital. suppl.) The

charter makes no such specification. Eastern's assertion would seem to us, at first blush, merely an employment of the device of giving a dog a bad name and then hanging him for it. If in fact the only authorization for the profit-sharing arrangement was section 709(a), it would seem only too clear that the government's case must fall. Eastern's assertion that the Commission was in that position would seem merely an attempt to assume the point in issue. However, since other courts have taken precisely this approach, we must consider it.

In *American Export Lines, Inc.* v. *United States*, Ct. Cls., 1961, 290 F.2d 925, a case involving an apparently identical lease, the court said, at p. 927, "Section 5(b) of the Merchant Ship Sales Act of 1946 . . . provided for a basic charter hire[1] to be fixed at such rate as the Commission determined to be consistent with the policies of the Act, but at not less than 15 percent of the statutory sales price. . . ." 290 F.2d at 927. The court thereafter stated as one of the issues in the case, "Was the Commission authorized under section 709(a) of the Merchant Marine Act of 1936 to charge additional charter hire on a sliding scale of 50, 75 and 90 percent of the cumulative voyage profits . . .?" It proceeded, "As a subsidiary question, was the additional charter hire in excess of 50 per cent of the cumulative net voyage profits a part of the basic

[1] The words "basic charter hire" are contained in the charter, but are not to be found in the statute. We note this fact because the court's use of these words constitutes, in our opinion, the first turn in a wrong road. These words may be a convenient and appropriate description for certain purposes, but, as will be developed later, the court uses them for purposes of statutory construction as if they had been contained in the statute itself.

While we are on this subject we might add that Eastern is content to adopt the argument based on these words. At the same time it is indignant with the government for making a counter-argument by substituting the phrase "minimum primary rental," decrying it as "supermarket and department-store terminology." Thus it all depends on whose Oxford is gored.

charter hire under section 5(b) of the Merchant Ship Sales Act of 1946?" 290 F.2d at 928.

The court concluded without difficulty, citing *Dichman, Wright & Pugh, Inc.* v. *United States*, D.C.S.D.N.Y., 1956, 144 F. Supp. 922, and *United States* v. *East Harbor Trading Corp.*, D.C.S.D.N.Y., 1960, 190 F. Supp. 245, that section 709(a) did not authorize the charging of more than 50 per cent of the net voyage profits. With this we quite agree, as did the court below. Then, with respect to the so-called subsidiary question, whether these larger amounts were inserted in the charter pursuant to the Commission's authority under section 5(b), the court said, "It may be the charter could have provided [this] . . . but the fact is that it did not so provide." Having thus decided that all that was done under section 5(b) was fixing 15 per cent as the "basic charter hire," the court concluded that the Commission had no further authority except what was conferred upon it by section 709(a), which section, as it had already decided, was insufficient to warrant the imposition of the larger amounts.

In *Dichman, Wright & Pugh, Inc.* v. *United States, supra*, cited by the court in *American Export Lines*, the court went further, in a dictum, conceding rather than stating as a "may be," that the larger amounts could legally have been imposed under section 5(b) had the Commission in fact done so. However, like *American Export*, the court then examined the agreement and concluded it had not done so. Finally,[1a] in *United States* v. *East Harbor Trading Corp., supra*, on a motion for summary judgment, the court adopted this dictum of the *Dichman* case, but held that it was a question for further proceedings to determine

[1a] After this opinion was written our attention was called to the case of *American Mail Line, Ltd.* v. *United States*, D.C. W.D. Wash., 12/19/62, also decided against the government. It adds nothing requiring separate discussion.

which section of the statute the government had in fact proceeded under.[2]

In the present case the district court, after reviewing these earlier decisions, dismissed their approach as a "recondite technicality." We must agree. The charter in no way stated that one of its paragraphs was the product of, or was inserted by virtue of, one section of the statute and the other of the other. The charter was an integrated agreement that made no reference to the statute in any particular. The Commission had a single, overall obligation to fix a charter hire.[3] It was but natural to place the formula for computing fixed, and the formula for computing contingent, rental in two separate paragraphs. Simply because the charter described the fixed charge as the "basic charter hire" and the Court of Claims[4] interpreted section 5(b) as "basic charter hire," and because the second paragraph was entitled "Additional Charter Hire" (in this case words used in ction 709(a), but equally descriptive and applicable to the charter provision whether within section 709(a) or not) the court concluded that the Commission had acted outside of its authority, although

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[2] These district court decisions may have constituted an empty victory for the shipping companies, as it was subsequently held that a number of pending suits for recovery of such payments allegedly illegally exacted were time-barred. *American-Foreign Steamship Corp.* v. *United States*, 2 Cir., 1961, 291 F. 2d 598, *cert. den.* 368 U.S. 895. *But cf. American Mail Line, Ltd.* v. *United States*, *supra* n. 1a. We do not consider that question, however, because in the case at bar all payments have not been made.

[3] It was to make contracts "in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." Section 207 of the 1936 Act, 46 U.S.C. 1117, incorporated into the 1946 Act by section 12 thereof, 50 U.S.C. App. 1745.

[4] 290 F 2d at 930-31, perhaps the best articulation of this point. Another argument is used in *Dichman, Wright & Pugh, Inc.* v. *United States*, *supra*.

conceding it might have provided exactly this, so far as substance was concerned, had it used some other form of expression.

To say that the Commission stultified itself by its choice of format is to elevate semantics above substance. Appellate courts frequently affirm district courts for being right, but for the wrong reason, and we may assume that district courts prefer this to not being affirmed at all. But the courts in the first two of these cases have reversed the Commission outright, and the third has questioned it, not for reaching an impermissible result, nor because it gave a wrong reason, but merely because they chose to think that it had one. We cannot accept this approach. If a commission or other body is doing something it would be authorized to do, the presumption should be that it was acting within its authority. With all due respect, we think these courts have lost sight of this principle in a forest of pedagogy.

Eastern contends that it appears of record that the Commission in fact relied upon section 709(a), and that this fact vitiates the charters in any event. We do not so construe the record.[5] But even if the Commission failed to make an exact analysis of the separate scope of each section of the act, Eastern's conclusion would not follow. The argument goes that such action would involve a determination that the fixed rate charged under section 5(b) was "consistent with the policies of [the] Act" as that section requires, which in turn would mean, Eastern says, that to charge anything further was inconsistent with the policies of the act. We do not subscribe to this reasoning. Rather,

[5] Essentially Eastern's argument is that the Commission constantly used the phrase "additional charter hire," and since this phrase appears in section 709(a) that is what it must have been proceeding under. "Additional charter hire" is not such a phrase of art that it must be so identified. On the contrary, it is accurately descriptive of the contingent charges no matter what was its source.

we assume the Commission determined that this particular fixed charge was consistent provided it was accompanied by the contingent obligations elsewhere provided for. Eastern's argument would lead to the strange result that even if the Commission was authorized to conclude that the larger percentages could be appropriate charter hire in a proper case, when the Commission charged them it felt they were inappropriate. For this Eastern must carry a heavy burden of proof which we hold it has not met.

We accordingly conclude that the only question for decision is whether, in point of fact, the Commission had authority to make charters requiring the payment of more than 50 per cent of the net voyage profits. Because of their interrelationship we must consider both the 1936 and the 1946 acts. The 1936 Act covered a number of subjects. Subchapter VII, entitled Private Charter Operation, authorized the Commission to recondition old merchant vessels, and to construct new ones, in private yards by competitive bids. The Commission was then authorized to charter such vessels by competitive bidding, section 706, 46 U.S.C. § 1196, or, in certain circumstances, without bidding, section 714, 46 U.S.C. § 1204. In the case of competitive bids the Commission was to accept, subject to certain, here irrelevant, conditions, the "bidder proposing to pay the highest monthly charter hire." Section 707, 46 U.S.C. § 1197. In all cases, the Commission was to demise "upon an annual charter hire of not less than 5 per centum of the [statutorily determined] foreign cost . . . plus 3½ per centum of the depreciated foreign cost." Sections 706, 714 (as amended), 46 U.S.C. §§ 1196, 1204. Also, in both cases there was applicable section 709(a), 46 U.S.C. § 1199, entitled "Excess Profits," quoted *supra*, containing the 50 per cent profit obligation with which we are presently concerned.

In the 1946 Act there was substituted for competitive bidding authority in the Commission to negotiate and set

rates, subject to certain floors. Section 5(b), *supra*. The Commission was bound by another floor as the result of the incorporation of section 709(a) of the 1936 Act. Eastern's position is that this section also set a ceiling. It states, to the point of redundance, that "shall" when used in that section was a "mandatory" word, and that a requirement that an agreement "shall" contain a certain profit-sharing obligation makes it mandatory that it not contain a greater one. We may agree that in this case "shall" was used in a mandatory sense. It does not necessarily follow, as Eastern would have us believe, that there was an implicit mandatory negative.

We start with the familiar maxim, singularly not referred to by either party, *expressio* (or *inclusio*) *unius est exclusio alterius*. It is universally held that this maxim is a guide to construction, not a positive command. This is sufficient answer to Eastern's primary contention. Whether the specification of one matter means the exclusion of another is a matter of legislative intent for which one must look to the statute as a whole. *Springer* v. *Gov't of the Philippine Islands*, 1928, 277 U.S. 189; *City of New York* v. *Davis*, 2 Cir., 1925, 7 F.2d 566; *Simmons* v. *County of Suffolk*, 1918, 230 Mass. 236; *Esso Standard Oil Co.* v. *Holderman*, 1962, 75 N.J. Super. 455; *State ex rel. Curtis* v. *De Corps*, 1938, 134 Ohio St. 295; *Industrial Trust Co.* v. *Goldman*, 1937, 59 R.I. 11; *Attorney General of Utah* v. *Pomeroy*, 1937, 93 Utah 426; *Colquhoun* v. *Brooks*, 1888, 21 Q.B.D. 52, 65. An apt illustration that this is a matter of interpretation in each case may be found in *Attorney General of Utah* v. *Pomeroy*, *supra*. There the court pointed to the constitutional requirement that no person "shall be convicted of Treason unless on the Testimony of two Witnesses . . ." Could this mean, the court asked, that the government's case would fail if there were three. So, here, whether a provision that the government's price setting agent, the Commission, must provide for a recapture of 50 per cent of the net voyage profits in excess of 10 per cent

means that it could not provide for more must be determined on the circumstances as a whole.

On the matter of legislative intent, some of Eastern's arguments are readily disposed of. It cites the proposition that if two statutes conflict, the specific must control the general. Hence, it says, section 5(b), which gives discretion to the Commission to fix rates, must be controlled by section 709(a), which limits that discretion in a certain particular. This does not bolster Eastern's point; it merely assumes it. In the same manner it says that section 5(b) limits the Commission's authority to charters which are "consistent with the policies of this Act," and that section 709(a) represents that policy. Again, this does not help us to construe section 709(a), but only takes us back to the starting point. The question remains, to what extent does section 709(a) seek to control section 5(b)?

Eastern says that if section 709(a) was not intended to set a ceiling as well as a floor, it should have contained the words "not less than." Statutes are not always drawn with such particularity, but may leave such matters to implication. Moreover, when a section is adopted bodily from some other act, care is not necessarily exercised to consider every difference which might arise under the changed conditions. We would agree with Eastern that in the 1936 Act, where section 709(a) was to be read in conjunction with section 706, section 709(a) was, as a practical matter, both a floor and a ceiling. The reason is obvious. Under section 707 competitive bids were to be judged by the "highest monthly charter hire." Hence no bidder would propose a higher profit-sharing provision than that required by section 709(a) because this would be to assume a burden to no purpose. By the same token the Commission would have no basis for imposing larger percentages. This was an understandable and desirable result. It might be difficult for the Commission, as a ministerial matter, to

determine which was the "highest" bid if there were submissions varying not only in the fixed rate but in the contingency rate as well. When section 709(a) was inserted into an act which, subject to certain floors, gave the Commission itself power to set rates, it does not follow that it must be taken as reading a mandatory ceiling into that new procedure. The fact that a statute may point in a certain way when employed in one connection does not mean that it must be read exactly the same way in another connection. As we held in *Sherman* v. *Hamilton*, 1 Cir., 1961, 295 F.2d 516, *cert. den.* 369 U.S. 820, the answer depends upon the total context.[6]

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[6] For this reason, even if Eastern's argument based upon the legislative history of section 709(a) in 1936 were sound, we would reject it. In fact it is not sound. Eastern states that a "proposal [for a sliding profit scale] was rejected, and Congress instead adopted the mandatory 50 percent profit sharing provision of section 709(a) . . ." Due to omissions this statement is highly misleading. The proposed sliding scale (which set no rates, and hence would have permitted the Commission to set even as maxima very modest amounts) was contained in section 47 of S. 4110, 74th Cong., 2d Sess. (1936), a bill introduced by Senator Guffey. But the "rejection" by the Senate Committee on Commerce, was not of the section 47 proposal, but, rather, of the entire bill, on the ground that government chartering was, per se, undesirable. The complaint was that chartering was a give-away. See S. Rep. 1721, 74th Cong., 2d Sess. (1936). Subsequently, Senator Guffey prepared a new version of his bill, in which section 47(a) contained the language now in section 709(a) of the act. See H.R. 8555, Amendments intended to be proposed by Senator Guffey, April 24 (Calendar day, May 4), 1936, 74th Cong., 2d Sess. Senator Guffey apparently never introduced this version of his bill into the Senate. Instead, he joined with Senators Gibson and Copeland in introducing a new bill which also included a section containing the language now in section 709(a) of the act. See 80 Cong. Rec. 9885 (1936); § 709(a), H.R. 8555, Committee Print, June 13, 1936, 74th Cong., 2d Sess. This section was accepted without amendment. While this particular section may have been designed generally to meet "give-away" objections, we cannot draw any conclusions from this history helpful to Eastern.

Eastern makes a further argument which really goes back to the 1936 Act, but is couched in terms of construing section 709(a) in conjunction with section 5(b) of the 1946 Act. In substance it is that under section 709(a) "net voyage profits" are determined by deducting "the charter hire reserved in the charter and . . . reasonable overhead . . . ." and that if the so-called larger percentages were in fact imposed under section 5(b) they would constitute part of "the charter hire reserved in the charter" and therefore would have to be so credited, with consequent confusion. It may be conceded that when section 709(a) was to be read in connection with charters made pursuant to section 706 of the 1936 Act, for reasons already discussed no larger percentages would be entailed because no bid would have included any such amounts. Possibly if Congress had been starting from scratch in 1946 it would not have devised exactly the section 709(a) language. But this does not mean that this language is inconsistent with the Commission's determination under section 5(b) to charge larger percentages. On the contrary, it seems to us that Eastern's argument is forced and unnatural. Section 709(a) required that every charter contain a provision for the payment of one half of the net profits (as therein defined) as "additional charter hire." At the same time it provided that "charter hire" was to be deducted to determine the profits. Hence, if Eastern wishes to be entirely literal, it would have to say that even as to the 50 per cent profit payment, this is part of the "charter hire" and so is ordered to be deducted. Obviously, such a strict reading of the language is absurd, for as a matter of common sense profits are not deducted in order to determine profits. Eastern naturally does not so read the language when it is considering the 50 per cent profit provision. It only seeks to do so when the percentages are larger. We do not believe that such manufactured complications show the intent of Congress.

In sum, we find no specific, single answer to the question of intent. We turn to more general matters. Eastern alleges that the policy of the 1946 Act was to assist the shipping industry. This may be conceded. The act had other purposes as well. The very fact that the Commission could in no case make a lease calling for less profit-sharing than is specified in section 709(a) shows that Congressional liberality was not unlimited. Even more uncompromising is the final clause in section 5(b) which provided that if the Commission in a particular case voted to charge less than the regular 15 per cent minimum provided in that section, the charter hire should in no event be "less than the prevailing world market charter rates." It is difficult to regard this as an indication of general beneficence. The reason is clear. The dominant purpose of the 1946 Act was to sell vessels, not to charter them. At all times preference was to be given to applicants proposing to purchase. Section 7(a), 50 U.S.C. App. § 1740(a). In fact a vessel could not be chartered at all until it had been advertised for sale for 60 days. Section 5(a), 50 U.S.C. App. § 1738(a). Rather than trying to temper the wind to charterers, we must conclude that the important consideration was to avoid making charters too cheap. As the court said in *American President Lines, Ltd.* v. *United States*, 3 Cir., 1959, 265 F.2d 552, 553, quoting the district court, "[I]f the hire were made too attractive the pronounced policy to demise vessels outright would be thwarted. No prudent business man would purchase a commodity which could be leased at a comparatively more favorable price."[7]

[7] The phrase "consistent with the policies of this Act," which Eastern argues means "be kind to shippers," not only may refer to this other purpose, but there is evidence that in fact it was so intended. "Inasmuch as the policy of the measure is to put as many war-built vessels as possible into private ownership, the Commission is directed not to approve applications to charter unless such chartering is consistent with the policies of the Act." S. Rep. No. 807, 79th Cong., 1st Sess. 13 (1945).

This did not mean that charterers were to be taken advantage of. Congressional aid to shippers, tangibly expressed by subsidy provisions which could cushion losses to charterers as well as to owners, remained in effect. *Cf. United States* v. *Moore-McCormack Lines, Inc.*, 4 Cir., 1962, 308 F.2d 866. But certainly an intention to aid shippers did not mean that every provision in the act was to be construed against the government. We suggest that the very existence of the subsidy is a reason for not restricting the freedom given to the Commission under section 5(b) to negotiate for amply large initial charter rates.[8]

In section 5(b) Congress gave the Commission discretion to charge such rates as it felt appropriate, except that it established two floors. In section 709(a) it established another floor. These floors were specifically and unambiguously stated. Eastern's asserted ceiling exists, at best, only by implication. While we would be prepared to find such an implication if it seemed called for, we believe that limitations upon an otherwise general grant of power should not lightly be inferred. *Springer* v. *Gov't of the Philippine Islands, supra; cf. Esso Standard Oil Co.* v. *Holderman, supra; State ex rel. Curtis* v. *De Corps, supra.* Viewing this statute as a whole our disposition is against doing so. We accept the assumption, or conclusion, of the three cases initially discussed, and hold that the Commission was authorized to include the larger percentages in the charters.

Although we have reached this decision independently we do not wish, by silence, to deny the validity of certain other of the government contentions, particularly its point

[8] Actually, the government makes a persuasive argument that within the framework of this act it could be to the advantage of shippers to permit the Commission to charge more than 50 per cent of graduated profits, for if it could not do this it might feel called upon to demand a larger fixed fee. If a venture proved unsuccessful, the higher fixed rate could obviously be disastrous.

that in case of ambiguity it is appropriate to give weight to the view of the body entrusted to administer the act. *American Power & Light Co.* v. *S.E.C.*, 1 Cir., 1944, 141 F.2d 606, *aff'd*, 329 U.S. 90; *West Texas Utilities Co.* v. *N.L.R.B.*, D.C. Cir., 1950, 184 F.2d 233, *cert. den.* 341 U.S. 939; *North American Utility Securities Corp.* v. *Posen*, 2 Cir., 1949, 176 F.2d 194. One cannot fail to be impressed by the attention which the Commission gave to the desirability of charging the larger percentages and to the reasons which motivated it. However, we regard this as unnecessary to our decision.

The second aspect of the case is Eastern's contention that the Commission had no power to change the basis of accounting, and hence worsen its position under the charter, in September 1947, by terminating the charter and granting a new one.[8] Since the charter was terminable at will, this change was normally the Commission's right. *Gebhard* v. *Royce Aluminum Corp.*, 1 Cir., 1961, 296 F.2d 17. Eastern's complaint is bottomed on the argument we have already considered, that section 709(a) was for the benefit of shippers and set a ceiling upon the Commission's authority with respect to profit-sharing agreements. This part of its case must fall with the other.

Finally, Eastern makes a separate contention with respect to two single voyage subcharters made by Eastern just before September 1, 1947 and consented to by the Commission pursuant to a clause in the charter requiring its consent to any subcharter or assignment. Eastern takes the position that, irrespective of section 709(a), this assent prevented the Commission from terminating or modifying the charter with respect to these two vessels until these voyages had been completed. The provision requiring the Commission's assent was inserted for the government's

[8] Eastern says in reality the Commission rewrote the charter. Whether this is the substance of the matter makes no present difference.

benefit, not for Eastern's. Indeed, Eastern agrees that the Commission might have terminated the charter outright on September 1 in spite of this assent. In that case Eastern would have been under no obligation to the subcharterers because their agreements contained a provision releasing Eastern in case of "frustration," and an outright termination of the charter would have been obvious frustration. Eastern's point is that the Commission's grant of a new charter, although on different terms, deprived it of this defense, and consequently the government should be held to the original charter. We cannot believe that the Commission's permitting Eastern to make a subcharter was intended as an enlargement of Eastern's rights.

Judgment will be entered affirming the judgment of the District Court.

COMPARATIVE PROVISIONS OF THE STATUTES, THE REGULATIONS, AND THE CHARTERS

THE STATUTES

MERCHANT SHIP SALES ACT OF 1946
[50 U.S.C. App. 1735(b)]

Charter of War-Built Vessels to Citizens

SEC. 5. * * *

(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rate for similar vessels for similar use as determined by the Commission.

(c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section.

* * *

SEC. 7. * * *

(b) After the cessation of hostilities, operation of vessels in commercial service by the United States, either for its own account or through operating agents under agency agreements, shall, except as to the Panama Railroad Company and other services specifically authorized by law, be continued only to the extent necessary to effect orderly transfer of vessels to private operation.

MERCHANT MARINE ACT, 1936
[46 U.S.C. 1199]

TITLE VII -- Private Charter Operation

SEC. 709. (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the

THE REGULATIONS

GENERAL ORDER NO. 60, AS AMENDED

SUBPART C--CHARTER OF WAR-BUILT VESSELS TO CITIZENS

299.31 Charter of war-built vessels to citizens of the United States --

* * *

(f) Charter hire. The monthly charter hire for any vessel chartered under the provisions of the Act shall be one-twelfth of an amount not less than 15% of the statutory sales price (computed as of the date of delivery of the vessel under the charter), except upon the affirmative vote of not less than four members of the Commission. Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rates for similar vessels for similar use as determined by the Commission.
[46 C.F.R. 299.31(f)]

(g) Mandatory provisions in charter. Every charter made by the Commission pursuant to the provisions of the Act shall provide:

(1) Excess profits of charterer. That whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the short sea

WAR SHIPPING ADMINISTRATION

BAREBOAT CHARTER AGREEMENT

"WARSHIPDEMGLSCOUT 203"

CLAUSE E. Rate of Basic Charter Hire. Unless otherwise specially agreed, such rates as appear opposite the name of each Vessel listed in Clause C(1) and such addenda as may be executed.

* * *

CLAUSE C. (1) Vessels Chartered and Other Details. The Vessel or Vessels to which this agreement relates, and the respective ports of delivery (if known) and applicable operating limits are as follows or as may be included hereunder by Addenda hereafter executed:

Name and Type of Vessel	Port of Delivery	Basic Hire Per Calendar Month	Valuation	Operating Limits as Specified in Clause:

CLAUSE 12. Basic Charter Hire. The Charterer shall pay to the Owner the basic charter hire at the monthly rate provided for in Part I hereof from the day and hour of delivery of the Vessels until and including the day and hour of redelivery to the Owner pursuant to the terms of this Agreement; or if any Vessel shall be lost, hire shall continue until the time of her loss, if known, or if the time of loss be uncertain then up to and including the time last heard from. Payment of such basic charter hire shall be made to the Owner at Washington, D. C., on delivery of the Vessel for the remainder of the calendar month in which delivery is made, and thereafter monthly in advance on the first day of each month.

CLAUSE 13. Additional Charter Hire. After redelivery of all Vessels under this Agreement, if the cumulative net voyage profits computed for the period of the agreement (after the payment of the basic charter hire provided herein and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall be in excess of a rate of ten (10) per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels during the period of the agreement (all as

COMPARATIVE PROVISIONS OF THE STATUTES, THE REGULATIONS, AND THE CHARTERS

THE REGULATIONS

GENERAL ORDER NO. 60, AS AMENDED

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CHARTER NO. MCc-41881

(Dated as of October 1, 1946)

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* * *

CLAUSE C. (1) Vessels Chartered and Other Details. The Vessel or Vessels to which this Agreement relates, and the respective ports of delivery (if known) and applicable operating limits are as follows or as may be included hereunder by Addenda hereafter executed:

Name and Type of Vessel	Port of Delivery	Basic Hire Per Calendar Month*	Valuation	Operating Limits as Specified in Clause:
MERRIMAC SEAM (EC2-S-AW1)		$ 7,987.50	$ 639,000	D1(a)

* 15% per annum of either the unadjusted statutory sales price or the floor price of the vessel, whichever is higher.

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CLAUSE 13. Additional Charter Hire. If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D. C., within 30 days after

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(c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section.

* * *

SEC. 7. * * *

(b) After the cessation of hostilities, operation of vessels in commercial service by the United States, either for its own account or through operating agents under agency agreements, shall, except as to the Panama Railroad Company and other services specifically authorized by law, be continued only to the extent necessary to effect orderly transfer of vessels to private operation.

MERCHANT MARINE ACT, 1936
[46 U.S.C. 1199]

TITLE VII -- Private Charter Operation

SEC. 709. (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum of the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: Provided, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

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(g) Mandatory provisions in charter. Every charter made by the Commission pursuant to the provisions of the Act shall provide:

(1) Excess profits of charterer. That whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10% per annum on the charterer's capital necessarily employed in the business of the vessel or vessels covered by the same charter, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10% per annum on such capital; Provided, that the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years. . . . [46 C.F.R. 299.31(g)]

* * *

(k) Preliminary determination and payment of "additional charter hire". . . Such payments shall be deemed to be preliminary and subject to adjustment upon the completion of audit by the Commission covering the period involved, and neither the tender thereof by the charterer, nor its acceptance by the Commission, shall prejudice the rights of either under the applicable bareboat charter agreement or otherwise. . . . [46 C.F.R. 299.31(k)]

* * *

(b)(5) That if, in any instance, the rules and regulations prescribed herein should conflict with the provisions of an applicable statute or agreement, such psovisions shall govern; . . . [46 C.F.R. 299.56(b)(5)]

Name and Type of Vessel	Port of Delivery	Basic Hire Per Calendar Month	Valuation	Operating Limits as Specified in Clause:

CLAUSE 12. Basic Charter Hire. The Charterer shall pay to the Owner the basic charter hire at the monthly rate provided for in Part I hereof from the day and hour of delivery of the Vessels until and including the day and hour of redelivery to the Owner pursuant to the terms of this Agreement; or if any Vessel shall be lost, hire shall continue until the time of her loss, if known, or if the time of loss be uncertain then up to and including the time last heard from. Payment of such basic charter hire shall be made to the Owner at Washington, D. C., on delivery of the Vessel for the remainder of the calendar month in which delivery is made, and thereafter monthly in advance on the first day of each month.

CLAUSE 13. Additional Charter Hire. After redelivery of all Vessels under this Agreement, if the cumulative net voyage profits computed for the period of the agreement (after the payment of the basic charter hire provided herein and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall be in excess of a rate of ten (10) per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels during the period of the agreement (all as hereinafter defined in Clause 23) the Charterer shall pay to the Owner at Washington, D. C. within sixty (60) days thereafter, an amount equal to one-half of such cumulative net voyage profit in excess of an amount computed for the period of the agreement at the rate of ten (10) per centum per annum on such capital as hire in addition to the hire payable under Clause 12; . . .

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(g) Mandatory provisions in charter. Every charter made by the Commission pursuant to the provisions of the Act shall provide:

(1) Excess profits of charterer. That whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10% per annum on the charterer's capital necessarily employed in the business of the vessel or vessels covered by the same charter, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10% per annum on such capital; Provided, that the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years. . . . [46 C.F.R. 299.31(g)]

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(k) Preliminary determination and payment of "additional charter hire". . . Such payments shall be deemed to be preliminary and subject to adjustment upon the completion of audit by the Commission covering the period involved, and neither the tender thereof by the charterer, nor its acceptance by the Commission, shall prejudice the rights of either under the applicable bareboat charter agreement or otherwise. . . . [46 C.F.R. 299.31(k)]

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CLAUSE 13. Additional Charter Hire. If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day - 50%.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day - 75% on such excess over $100 per day.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day - 90% on such excess over $300 per day.

* * *

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 137

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Since this case involves a direct and recognized conflict of decisions between the court below and the Court of Claims and the issues involved are recurrent, the United States does not oppose granting the petition for a writ of certiorari.

1. This litigation involves the interpretation of the Merchant Ship Sales Act of 1946, 60 Stat. 41, as amended, 50 U.S.C. App. 1735–1746, and of the standard-form charter agreements executed by the United States Maritime Commission under the Act. The Merchant Ship Sales Act was adopted for the purpose of authorizing the sale of merchant vessels constructed for the government during World War II. The Act

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also empowered the Commission to charter such vessels for bareboat use. However, Section 7 of the Act, 50 U.S.C. App. 1740, specifically stipulated that applications to purchase vessels shall be preferred over applications to charter them. "Inasmuch as the policy of the measure is to put as many war-built vessels as possible into private ownership," Congress directed the Commission "not to approve applications to charter unless such chartering is consistent with the policies of the act." S. Rep. No. 807, 79th Cong., 1st Sess., p. 13; see Section 5(a) of the Act, 50 U.S.C. App. 1738(a).

With respect to the chartering of vessels, Section 5(b) of the Act directed the Commission to fix the charter hire at such rate as the Commission determines to be consistent with the policies of the Act. That rate, the Section states, "shall not be less than 15 per centum per annum of the statutory sales price," except upon the affirmative vote of not less than four members of the Commission, and not less than the prevailing world market charter rate for similar vessels for similar use. In addition, Section 5(c) referred to several provisions of the Merchant Marine Act of 1936, 49 Stat. 1985, as amended, 46 U.S.C. 1198–1200, 1202, 1203, including Section 709(a) which stipulates that every charter shall provide that "whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits * * * shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over

to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum * * *."

Thereafter, the Commission approved the use of a standard-form charter agreement, and petitioners entered into such a charter agreement with the Commission during 1946. The contract required the payment of a "Basic Charter Hire" fixed at a flat rate of 15 percent per annum of the statutory sales price, *i.e.*, the minimum rate prescribed by Section 5(b) of the Act. It also provided for the payment of "Additional Charter Hire" in the event that the charterer realized excess profits—that is, "[i]f at the end of the calendar year * * * the cumulative net voyage profit * * * shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the [chartered vessels]." The additional charter hire required by the agreement, was not limited to a fixed 50 percent of the excess profits; rather, it was to be computed on the basis of a sliding scale of 50, 75, and 90 percent.[1]

[1] The charter agreement with the shipper provided:

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day."

Petitioners' operations resulted in cumulative net voyage profits in excess of $100 per day. Therefore, under the charter agreement they were obligated to pay, and did in fact pay, to the government "additional charter hire" computed at 75 and 90 percent of the excess profits. By this action, petitioners seek to recover that portion of these payments which exceeded the 50 percent "additional charter hire" provided in Section 709(a). They claim (Pet. 11–18) that the "Additional Charter Hire ' clause was inserted in the agreement pursuant to Section 709(a), and that this Section limits the amount of the additional charter hire to 50 percent of the excess profits.

The government submits, on the other hand, that both courts below correctly concluded that the Commission had authority under Section 5(b) of the Merchant Ship Sales Act of 1946—which grants the Commission authority to fix the charter hire at such rate as it determines to be consistent with the policies of the Act—to insert into charters an "Additional Charter Hire" clause requiring the payment of more than 50 percent of the excess profits. The resolution of this question depends upon whether Section 709(a) of the Merchant Marine Act of 1936, which is made applicable under the 1946 Act and which provides for additional charter hire of 50 percent of excess profits, was intended to limit the additional charter hire which the Commission could require. We believe that Section 5(b), which was passed after Section 709(a), allows, in plain terms, the fixing of a rate above that

provided by Section 709(a). The reference to Section 709(a), in our view, was not intended to curtail the authority of the Commission to negotiate a higher rate, [redacted] but only to make it plain that the Commission must recapture at least 50 percent. This construction is consistent with the policy underlying the 1946 Act. As the court of appeals held (Pet. App. A, p. 13), the "dominant purpose of the 1946 Act was to sell vessels, not to charter them"; accordingly, "the important consideration was to avoid making charters too cheap." Thus, it may not be properly assumed that Congress intended to fix absolute rates which the Commission could not vary regardless of the amount of profit charterers were earning.

The Court of Claims, contrary to the court below, has held (one judge dissenting) that the crucial issue is whether the "Additional Charter Hire" clause of the agreement was in fact adopted under Section 709(a) or under Section 5(b). *American Export Lines, Inc.* v. *United States*, 290 F. 2d 925. Since it determined that the clause was adopted under Section 709(a) and that that Section, standing by itself, only authorized the Commission to contract for 50 percent of the excess profits, the Court of Claims concluded that the Commission had no authority to charge any amount as additional charter hire in excess of 50 percent. Accord, *Dichman, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (S.D. N.Y.); *American Mail Line, Ltd.* v. *United States*, 213 F. Supp.

152 (W.D. Wash.); cf. *United States* v. *East Harbor Trading Corp.*, 190 F. Supp. 245 (S.D. N.Y.).[2]

While we think the decision below is correct, we nevertheless do not oppose the granting of certiorari on this issue. The Court of Claims' decision is in square conflict with the holding below. Indeed, the court below explicitly rejected the *American Export Lines* case as a "recondite technicality." It further stated that there was no way to ascertain whether the "Additional Charter Hire" clause was adopted under Section 5(b) or Section 709(a) and that, in any event, the clause was valid so long as Congress somewhere conferred authority to adopt it (Pet. App. A, pp. 6–7).

Apart from the conflict in decisions, the question is of recurring importance. Including the instant case, there are 36 suits pending against the United States involving the legality of the "Additional Charter Hire" clause. The total amount claimed in these suits exceeds fourteen million dollars. In addition, the United States has filed 38 claims, either by way of cross libel or by institution of a separate suit based

[2] Having determined that the additional charter hire clause was inserted into the contract under Section 709(a), the Court of Claims did not reach the question whether Section 5(b) authorized the Commission to contract for more than 50 percent of the excess profits. It did note, however, that "[i]t may be the charter could have provided [for the payment of the additional charter hire under Section 5(b)] * * * but the fact is it did not so provide." 299 F. 2d at 931. The district court in *Dichman* went further and conceded that the higher rates could have legally been imposed under Section 5(b) had the Commission in fact chosen to base its rates on that Section. 144 F. Supp. at 926.

on the "Additional Charter Hire Clause." These cases involve approximately six million dollars. The United States also contemplates the filing of several additional suits.

2. The charter also contained a clause permitting either the Commission or the charterer to terminate the period of use of any of the vessels by giving at least fifteen days' written notice to the other party. The clause further provided that the agreement could be terminated, modified, or amended at any time by mutual consent. On August 15, 1947, the Commission sent to petitioners and other charterers a telegram stating that the use of any and all vessels chartered to their respective companies pursuant to the provisions of the standard-form charter agreement would be terminated after fifteen days. On August 20, 1947, the Commission sent petitioners and other charterers a telegram advising that the charters would not be terminated if the parties agreed to a proposed addendum. Petitioners agreed to the addendum, which provided in pertinent part that the additional charter hire (computed on the basis of profits above 15 percent of the statutory sales price) would thereafter be computed, accounted for, and paid separately for voyages which were subject to the terms of the addendum. While petitioners made excess profits and therefore paid additional charter hire on voyages prior to the addendum, petitioners sustained losses from their operations during 1947 after the charter agreement was amended.

Petitioners challenge the legality of the addendum on the ground that its effect was to divide the calen-

dar year 1947 into two parts for purposes of profit-sharing computations under the "Additional Charter Hire" clause of the agreement. They argue that this is inconsistent with Section 709(a) of the 1936 Act which prescribes "calendar year" accounting of profits. Therefore, they conclude, the cumulative net voyage profits earned prior to the addendum should be reduced by the losses sustained thereafter in 1947 for purposes of accounting in paying the "Additional Charter Hire" for that year.

The court of appeals sustained the legality of the addendum to the agreement. It based its conclusion upon the fact that the charter agreement expressly provided that it could be terminated for any or no reason by either party on fifteen days' notice. It was therefore clearly proper for the Commission to decide to terminate the agreement unless the charterer accepted modification of the agreement. Furthermore, as we have shown above, the Commission's authority to require the "Additional Charter Hire" clause stems from Section 5(b) of the 1946 Act, not Section 709(a).

While there is no conflict on this issue, we do not oppose the suggestion that it be reviewed. For the resolution of this issue, like the resolution of the first issue discussed above (see *supra*, pp. 1–7), depends on whether Section 709(a) or Section 5(b) is controlling. If the Court grants certiorari on the first issue, we believe that it would be appropriate to consider this related issue at the same time. Moreover, a considerable number of the pending cases involving the first issue (see *supra*, pp. 6–7) also involve the addendum.

CONCLUSION

For the foregoing reasons, we do not oppose the petition for a writ of certiorari.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JUNE 1963.

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No. 137

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, *Petitioners*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR PETITIONERS

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December 12, 1963

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 137

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, *Petitioners*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the district court (R. 5-25) are reported at 202 F. Supp. 297 and 210 F. Supp. 822. The opinion of the court of appeals (R. 247-260) is reported at 312 F. 2d 214.[1]

[1] The record herein consists of the appendices printed for the use of the court below, to which have been added the opinion and judgment of that court. This brief is accompanied by a separate document containing Appendices A and B. Appendix A ("A. ....") contains the recent unreported decision of *American President Lines, Ltd.* v. *United States* (N.D. Cal., Oct. 10, 1963). Appendix B ("B. ....") contains portions of the legislative history which are too lengthy to be conveniently set forth as footnotes to the brief.

JURISDICTION

The judgment of the court of appeals was entered January 8, 1963 (R. 260). On March 26, 1963, the time to file a petition for certiorari was extended to and including June 7, 1963 (R. 261). The petition was filed on May 16, 1963, and was granted on October 14, 1963 (R. 262), ... U.S. ... Jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Petitioners bareboat chartered vessels in 1946 from the former United States Maritime Commission ("Maritime") under section 5 of the Merchant Ship Sales Act of 1946. That section provided for an annual charter hire of not less than 15 percent of the sales price of the vessels chartered and for the inclusion in all charters of the terms of section 709(a) of the Merchant Marine Act, 1936, which specified a 50 percent division with the Government of profits earned by the chartered vessels. Maritime promulgated a form of charter which substituted a sliding scale of profit sharing up to 90 percent for the statutory 50 percent.

> The first question is whether Maritime was authorized to increase the 50 percent share of profits specified by section 709(a) to the sliding scale shares up to 90 percent.

2. In mid-1947, a sharp decline occurred in shipping, and Maritime, foreseeing a reduction of its share of profits because of losses anticipated later in that year, gave petitioners fifteen days' notice of termination of the charter as of September 1, 1947, but permitted the charter to continue upon condition that losses

from voyages after September 1 not be offset or averaged with the profits from voyages prior to that date in computing the profits to be paid to Maritime.

The second question is whether this requirement, dividing the calendar year 1947 into two parts for profit sharing computations, violated the provisions of section 709(a) prescribing "calendar year" accounting of "cumulative" net profits.

STATEMENT OF THE CASE AND THE STATUTES INVOLVED

1. The Merchant Ship Sales Act of 1946 (60 Stat. 41; 50 U.S.C. App. §§ 1735-1746, approved March 8, 1946) was designed to rehabilitate the private merchant marine, whose operations had been disrupted and fleets decimated by World War II losses and requisition. Section 7(b)[2] of the act provided that the Maritime Commission ("Maritime") should withdraw all surplus war-built vessels from governmental operation and sell or charter them to American companies for private commercial operation. Section 7(a) of the act provided that Maritime should "so far as practicable and consistent with the policies of this Act"

[2] Section 7(b) of the 1946 Act (50 U.S.C. App. § 1740) provided:

After the cessation of hostilities, operation of vessels in commercial service by the United States, either for its own account or through operating agents under agency agreements, shall, except as to the Panama Railroad Company and other services specifically authorized by law, be continued only to the extent necessary to effect orderly transfer of vessels to private operation.

give preference to citizen applicants to purchase over citizen applicants to charter.[3]

2. Maritime's authority with respect to fixing of the monetary terms of charter hire was contained in section 5 of the 1946 Act (50 U.S.C. App. § 1738). Subsection (b) of section 5 provided:

> The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). . . . [R]ates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rate for similar vessels for similar use as determined by the Commission.

Subsection (c) of section 5 provided:

> The provisions of section 708, *709*, 710, 712, and 713, of the Merchant Marine Act, 1936, as

[3] Section 7(a) of the 1946 Act (50 U.S.C. App. § 1740) provided:

> In exercising its powers under this Act and under other provisions of law with respect to the sale and charter of war-built vessels, the Commission shall . . . as between citizen applicants to purchase and citizen applicants to charter . . . so far as practicable and consistent with the policies of this Act, give preference to citizen applicants to purchase. In determining the order of preference between citizen applicants to purchase or between citizen applicants to charter, the Commission shall consider, among other relevant factors, the extent to which losses and requisitions of the applicant's prewar tonnage have been overcome and shall in all cases, in the sale and charter of a war-built vessel, give preference in such sale or charter, as the case may be, to the former owner of such vessel, or to the person for whom the vessel was constructed but to whom delivery thereof was prevented by the United States. . . .

amended, *shall be applicable to charters made under this section.*[4]

And section 709(a) of the 1936 Act (49 Stat. 2010; 46 U.S.C. § 1199) thus made a part of section 5 provided:

> *Every charter made by the Commission pursuant to the provisions of this title shall provide* that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the charterer vessels) shall exceed 10 per centum per annum on the charaterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, *one-half* of such cumulative net voyage profit in excess of 10 per centum per annum; *Provided,* That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

3. In March 1946, as a preliminary step in carrying out the chartering objectives of the 1946 Act, Maritime (the War Shipping Administration) entered into short term bareboat charters with established steamship companies under the emergency wartime provisions of Public Law 101,[5] pending the fixing of sales

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[4] Emphasis supplied in all quotations unless otherwise indicated.

[5] Public Law 101 (Act of June 6, 1941, c. 174, § 3; 55 Stat. 243; 50 U.S.C. App. § 1273(a)) permitted chartering by WSA:

> upon such terms and conditions, for such period or periods, and subject to such restrictions as the Commission [WSA] may deem necessary or desirable for the protection of the public interest, and at such rate of hire as it may deem to be fair and reasonable. . . .

prices for vessels and the issuance of regulations and charter terms under the 1946 Act.[6] The terms of the interim charters (see foldout sheet attached hereto) were modeled after section 5 of the 1946 Act, and thus provided for a "basic charter hire" of 15 percent of the proposed sales price and for "additional charter hire [equal to 50 percent of profits] payable in accordance with the provisions of Sec. 709, Merchant Marine Act, 1936. . . ." (R. 76).

4. In mid-August 1946, Maritime adopted the standard form of Ship Sales Act charter (called "SHIPSALESDEMISE 303"). Petitioners (a nonsubsidized company) signed one of these charters on October 1, 1946, and operated ten Liberty-type vessels during 1946 and 1947 carrying bulk cargoes, primarily coal, in the coastwise and transatlantic trades. In this charter, the "basic charter hire" rate was fixed pursuant to section 5(b), *supra*, at 15 percent per annum of the "unadjusted" statutory sales price of the vessels. This figure was higher than that adopted for the interim charters and was, for most of the Liberty vessels of the type chartered by petitioners, about $14,000 per annum higher than the minimum authorized by section 5(b).[7] In fixing the profit sharing or

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[6] Section 5(a) of the 1946 Act (50 U.S.C. App. § 1738(a)) provided:

> No vessel shall be chartered under this section until sixty days after publication of the applicable prewar domestic cost in the Federal Register under subsection 3(c) of this Act.

[7] Section 3(d) of the Ship Sales Act (50 U.S.C. App. § 1736(d)) provided for the fixing of a "statutory sales price," for each type of vessel, for a downward adjustment in that price of 5 percent depreciation per year up to the date of sale or charter, and for a "floor" price below which no depreciation would be deducted. In the case of Liberty-type vessels chartered by petitioners, the "statutory sales price" was $639,000, and the "floor" price, $544,506

"additional charter hire" referred to in section 709(a), *supra*, Maritime, however, rewrote section 709(a) to substitute sliding scale rates of 50, 75 and 90 percent for the 50 percent specified in the statute. (See fold-out sheet)

5. The charterers individually and through industry associations protested the sliding scale of "additional charter hire" because it conflicted with the 50 percent rate set by section 709(a).[8] Following these protests, but before execution of the charters, Maritime added a clause which provided that payments of hire would be preliminary and subject to later adjustment.[9] Mari-

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(46 C.F.R. 299.89). The minimum basic charter hire permitted by section 5(b) of the Act was 15 percent of the "floor" price, or $81,675.90. This was, for most of the vessels chartered by petitioners, the depreciated price, or adjusted price "computed as of the date of the charter" referred to in section 5(b). The rate adopted by Maritime in August 1946 for the Ship Sales Act charters was 15 percent per annum of the unadjusted "statutory sales price" of $639,000, or $95,850. Thus, the basic rate was $14,174.10 per annum in excess of the minimum authorized by section 5(b). The rate charged in the interim charter was $87,424.95 per annum (R. 76).

[8] The industry protests and the amendment of the charters to reserve the charterers' rights are summarized in the *en banc* decision of the Court of Appeals for the Second Circuit in *American-Foreign Steamship Corp.* v. *United States*, 291 F. 2d 598, *cert. denied*, 368 U.S. 895 (1961). See especially the majority opinion of Judge Smith, 291 F. 2d at 602, and the dissent of Judges Friendly and Moore, *id.* at 613-15. These protests and reservations were also noted in *American Mail Line, Ltd.* v. *United States*, 213 F. Supp. 152, 155-57 (W.D. Wash. 1962), and *American President Lines, Ltd.* v. *United States* (N.D. Cal. 1963) (A1-A15). See also ftns. 43-45, *infra*, pp. 38-39.

[9] Clause 13—*Additional Charter Hire.*

* * *

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on ac-

time also issued regulations which provided that the making of payments would not "prejudice the rights of either [party] under the applicable bareboat charter agreement or otherwise," and that if any charter provision was inconsistent with statute, the statute would govern.[10]

6. Both the interim and SHIPSALESDEMISE forms of charter restricted the routes on which the vessels might be operated and the cargoes which might be carried (R. 89). Maritime also issued regulations and instructions placing limitations on the freight rates charged to shippers and required that copies of all subcharters and contracts of affreightment be approved in advance of loading of cargo (R. 77-96).

7. In general, the charterers, including petitioners, sustained losses in late 1946 from the operation of vessels under the charters. On voyages during the first part of 1947, some of them made profits sufficient to require profit sharing payments in excess of 50 per-

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count of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISE-OUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT charters) at such times and in such manner and amounts as may be required by the Owner; provided however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required. (R. 183-84)

[10] Foldout sheet, quoting 46 C.F.R. §§ 299.31(k) and 299.56 (b)(5); also 46 C.F.R. § 299.39(a) and (b); 46 C.F.R. § 299.40(c); R. 98-106.

cent. The charter market then declined, and Maritime, concerned about losing its excessive shares of profits accrued up to that time, notified the charterers, including petitioners, on August 15, 1947, that their charters would be terminated as of September 1, 1947, but would be extended on condition that the charterers agree that losses from voyages after September 1 be accounted for separately from the profits on voyages commenced before that time.[11] Petitioners executed an addendum to the charter (called the "Foreign Trade Addendum") providing for this split acounting in 1947, such execution being subject to the reservation of rights, etc., described above in paragraph 5.

8. The effect, in petitioners' case, of the sliding scale and split year accounting was to allocate to the Government $516,000 of profits for the period prior to September 1, 1947, and to petitioners $196,000 for that period after allowable return. For the period after September 1, 1947, however, the vessels operated at a loss of $246,000 which was borne by petitioners but, because of the divided accounting requirement, did not reduce the share of profits allocable to the Government for the pre-September 1 period. The net result was that petitioners, on Maritime's accounting basis, will suffer a loss of $50,000 under the charter, while the Government will receive $1,223,000, consisting of $516,000 out of the profits for the first eight months of 1947 and

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[11] Maritime's reason for threatening to terminate the charters is recited in its annual report to Congress for the fiscal year ended June 30, 1948, as follows:

> This action was designed to require the charterer to carry on all operations after August 31, 1947, without offsetting future losses against additional charter hire due the Government, from voyage profits for the prior period. . . . (pp. 13-14)

$707,000 of basic charter hire paid to Maritime over the period of the charter (R. 109, 115).[12]

THE PROCEEDINGS BELOW

After the "final audit" of profits and losses from operations, petitioners brought an action under the reservation of rights clause of the charter and the applicable regulations to recover hire overpaid under the statute, and the Government counterclaimed for the amount withheld by petitioners because of these disputes.

The court below decided both the sliding scale and split accounting issues in favor of the Government, and affirmed the judgment of the district court against petitioners for the profit sharing hire which had been withheld. The court found in substance that the dominant purpose of the 1946 Act was to sell vessels, not to charter them, and that "the important consideration was to avoid making charters too cheap." (R. 258) It thus construed subsection (c) of section 5 (incorporating section 709(a)) as merely fixing a minimum profit sharing formula in favor of the Government, and found that the profit sharing percentages in excess of 50 percent were authorized by the general charter hire provisions of subsection (b) of section 5 of the 1946 Act, *supra*, which authorized charter hire "consistent with the policies of this Act. . ."

The court held that it was immaterial that Maritime had relied upon section 709(a) in fixing the profit sharing charges in excess of 50 percent since the power to increase the profit sharing hire existed in section

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[12] Petitioners' loss was partially reduced as a result of the compromise during the litigation of a collateral accounting claim under the charter (R. 30).

5(b). It found such misreliance to be merely a matter of form and not substance, and held that petitioners' contention was based upon a mere technicality. The court also upheld the split accounting requirement by similar reasoning.

SUMMARY OF ARGUMENT

Petitioners contend that the excess profit sharing provisions were not authorized by subsection (b) of section 5, because subsection (c) of the same section, incorporating section 709(a), set the profit sharing formula and limited the Government's share to 50 percent. The plain language of subsection (b) makes it clear that Congress authorized Maritime to establish thereunder only a fixed annual rate of hire based upon the statutory sales prices of the vessels. The equally plain and mandatory language of subsection (c) (incorporating section 709(a)) constituted an express limitation upon the power granted to Maritime by subsection (b), compelling the conclusion that Congress did not give Maritime discretion to change the profit sharing formula.

The record shows that Maritime adopted a fixed rate under section 5(b) of 15 percent, but modified the fifty-fifty profit sharing provisions of section 709 (a) without statutory authority because it thought that the Government should receive a greater share of the profits than that section provided. Since Maritime did not intend to fix the sliding scale excess shares under subsection (b) of section 5, the retroactive invocation of that subsection by the court below to validate the charge constitutes improper judicial reconstruction of agency action which has no foundation either in law or fact.

With respect to the divided accounting during the year 1947, petitioners contend that this requirement equally conflicts with the mandate of section 709(a) for "calendar year" accounting of "cumulative" profits. The record of Maritime's action in this respect shows that no bona fide termination of the charters was sought by the attempted cancellation in mid-1947 because, simultaneously with notice of termination, Maritime offered to continue the charters on condition that the charterers execute an amendment agreeing to the divided year accounting. This was done to circumvent the calendar year accounting plan of the statute and was accordingly invalid. The result was to permit the Government to retain its excessive shares of profits for the profitable portion of the year 1947 and to cast all of the losses thereafter upon the steamship industry, while the payment of basic charter hire continued as before.

ARGUMENT

I. THE PROFIT SHARING PERCENTAGES IN EXCESS OF 50 PERCENT WERE NOT AUTHORIZED BY SECTION 5 OF THE MERCHANT SHIP SALES ACT OF 1946

A. The Statutory Language is Clear and Unambiguous in Fixing Profit Sharing at 50 Percent

It is not necessary to go beyond the explicit language of section 5 to establish that the sliding scale exceeded the statutory authority conferred upon Maritime by Congress with respect to the fixing of bareboat charter terms.

The language of subsection (b) of section 5, *supra*, p. 4, is consistent only with the conclusion that it authorizes a fixed annual charter rate based upon a percentage of the statutory sales price of the vessels to be chartered. That subsection speaks of charter

hire to be "*fixed* by the Commission at such *rate* as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, *such rate* shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). . . ." If a lower rate were found justified by four of the members it must be "not less than the *prevailing world market charter rate for similar vessels for similar use . . .*"

A profit sharing arrangement does not qualify as a "rate" of bareboat charter hire nor as a "world market charter rate" in any normally accepted sense. Profit sharing is neither fixed, ascertainable, nor predictable within the contemplation of subsection (b), because it is contingent and could result in no payment of hire if there were no profit. And the most conclusive evidence that subsection (b) of section 5 was not intended to authorize a profit sharing plan is the fact that in subsection (c) of the same section Congress incorporated the mandatory profit sharing plan of section 709(a).[13]

Furthermore, while subsection (b) authorized Maritime to fix rates "consistent with the policies of this Act," that language is followed by several express limitations on Maritime's power. Maritime could not under that section validly make a determination that a 90

[13] The terms of section 709(a) were brought to the attention of Congress both in the debates and in the reports on the legislation. See 91 Cong. Rec. 11877 (Dec. 12, 1945), where the complete text of the section was read in the Senate. The section was also referred to in H.R. Rep. No. 831, 79th Cong., 1st Sess. p. 9 (1945), and in S. Rep. No. 807, 79th Cong., 1st Sess. pp. 13-14 (1945). See Appendix B, legislative history, pp. B10, B11-12.

percent profit sharing rate was "consistent" when another provision of the same section made mandatory a 50 percent rate. Certainly, it could not be argued that a basic rate of less than 15 percent (without the concurrence of four members of Maritime) would be "consistent" with the policies of the act. The 50 percent profit sharing formula is no less a "policy" of the act than the minimum 15 percent basic rate. Indeed, it is a fixed term of the act.

Thus, because of the limitations in section 5, including the incorporation of section 709(a), the only determination which Maritime was authorized to make under subsection (b) was one relating to a fixed rate of hire based upon the statutory sales price. Its determination was that this should be 15 percent of the unadjusted statutory sales price (R. 70-71). It considered, but decided against, increasing this basic rate because, as hereinafter shown, the increase would have been borne primarily by the Government.[14] Its determination to increase the profit sharing hire was reflected in its rewriting of section 709(a), and because of the mandatory character of that section that increase was not authorized.

The construction of the statute by the court below, interpreting subsection (c) (incorporating section 709(a)) as prescribing a minimum only, reads into the statute the words "not less than" which are not there. The court below conceded that these words had to be supplied by implication (R. 255, 312 F. 2d at 220). As was pointed out in *American President Lines, Ltd.* v. *United States* (Appendix A), Congress employed the words "not less than" twice in subsection (b) of

[14] Infra, p. 36.

section 5 and knew their significance.[15] That court said (A6):

> To hold that the words "shall pay over to the Commission . . . one-half of . . . cumulative net voyage profit" means that the cumulative net voyage profit to be paid *shall not be less than* one-half thereof is judicial enactment into the statute of a concept and words which are not there. It cannot reasonably be contended that Congress did not know how to specify a minimum when it so intended. It did that very thing in this very statute by the requirements, in Section 5(b), that the charter rate "shall not be less than" 15 percent of statutory sales price except upon the affirmative vote of "not less than four members of the Commission" as well as by the requirement therein that the charter rate under certain circumstances "shall not be less than" the referenced prevailing world market rates. (Emphasis by the court)

While both sections 5(b) and 709(a) contain the words "charter hire," it is not difficult to perceive that they have different objectives and involve entirely different basic economic concepts to the charterer. Section 5(b) contemplates an annual fixed hire based upon a percentage of purchase price, an expense of operation payable irrespective of profits and loses. Section 709(a), on the other hand, defines "additional charter hire" and embodies a unique profit sharing arrangement not present in the normal charter. It is based upon a percentage of cumulative profits after deduction of the annual fixed hire, overhead expense and return on capital. The percentages referred to have no common base. The court below disregarded

[15] See legislative history, Appendix B, p. B13, for other sections of the 1946 Act using the words "not less than."

these different concepts in holding that subsection (b) of section 5 authorized the same type of arrangement as subsection (c). The actions taken by Maritime recognized this difference in concept, and it dealt separately with the fixed hire rate and with the profit sharing formula (R. 70-71).

Even if there were some ambiguity in the statutory language, there are several well-settled rules of statutory construction which compel the construction urged by petitioners. These rules were rejected by the court below in favor of the exceptions to the rules. One is that where two sections of the same statute are by their terms applicable to related subject matter, and one (section 709(a)) is specific, and the other (section 5(b)) is general, the specific provision controls to the exclusion of the general, particularly where, as so construed, conflict is avoided between the two sections.[16] Here, section 5(b) is applicable to the general subject of a fixed rate of "charter hire," which must "not be less than 15 per centum per annum of the statutory sales price." Section 709(a) is applicable, to use its own terminology, to profit sharing defined as "additional charter hire." Since this is the specific provision with respect to profit sharing, it controls that feature of the charter to the exclusion of the general "charter hire" provision of section 5(b).

A companion rule is that where a statute directs a government agency to act in a specific manner, that

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[16] *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 759 (1961), and the cases cited therein; *United States* v. *Moran*, 236 F. 2d 361, 363 (2d Cir. 1956), *cert. denied*, 352 U.S. 909 (1956); and *State Mutual Life Assur. Co.* v. *Commissioner*, 246 F. 2d 319, 323 (1st Cir. 1957).

direction includes a mandatory negative.[17] The mandatory language of section 709(a) shows it to be a maximum and minimum and negates the existence of discretion under 5(b) to change the profit sharing formula in any respect.

Finally, section 5 should be construed in such a way as to give effect to all of its parts, and any construction which creates a conflict or renders any part of the statute superfluous must be avoided. If Congress wished to give Maritime unfettered discretion to appropriate the charterers' profits, there was no need for section 709(a). The interpretation of the statutes adopted by the court below renders section 5(c) (incorporating section 709(a)) not only superfluous, but also incompatible with section 5(b), whereas the position of petitioners gives effect to both sections.[18]

B. The Weight of Well-Reasoned Authority Supports Petitioners

Nine decisions have been written dealing with the sliding scale profit sharing provisions contained in the Ship Sales Act form of charter. Four of these

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[17] *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1929); *Raleigh and Gaston R.R. Co.* v. *Reid*, 80 U.S. (13 Wall.) 269 (1872); *McIlhenny* v. *Commissioner*, 39 F. 2d 356, 358, (3d Cir. 1930); *United States* v. *Gutzler*, 105 F. 2d 188 (9th Cir. 1939); *Jones* v. *H.D. & J.K. Crosswell*, 60 F. 2d 827 (4th Cir. 1932); *cf. Sword Line* v. *United States*, 228 F. 2d 344, 346 (2d Cir. 1955).

[18] *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 133 (1879); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955); *Jarecki* v. *Searle & Co.*, 367 U.S. 303 (1961); *Ex parte Public Nat. Bank*, 278 U.S. 101, 104 (1928). The foregoing principle was applied in construing section 709(a) in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866, 871, 874 (4th Cir. 1962), *cert. denied*, 372 U.S. 944 (1963).

squarely support petitioner's position,[19] two tend to support it,[20] and three reject it.[21]

The first decision supporting petitioners was *Dichmann, Wright & Pugh, Inc.* v. *United States* (*"Dichmann"*), 144 F. Supp. 922, 925 (S.D.N.Y. 1956), in which Judge Dimock concluded that the Government's share of profits was limited by subsection (c) of section 5 (incorporating section 709(a)) to 50 percent and that the sliding scale portion could not be justified under the more general provisions of subsection (b), as follows:

> To substantiate such an expansion of the literal meaning of the statute and of its original intent, the owner invokes the power given to the Commission by section 5(b) to fix the charter hire rate. That power, however, was exhausted when the amount of the charter hire was fixed. That amount was fixed in dollars "at such rate as the Commission determines to be consistent with the policies of this Act". To say that the power to fix the charter hire carries over to the fixing of the

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[19] *Dichmann, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (S.D.N.Y. 1956); *American Export Lines, Inc.* v. *United States*, 290 F. 2d 925 (Ct. Cl. 1961); *American Mail Line, Ltd.* v. *United States*, 213 F. Supp. 152 (W.D. Wash. 1962); *American President Lines, Ltd.* v. *United States* (N.D. Cal. Oct. 10, 1963, unreported, Appendix A, pp. A1-A15).

[20] *Sword Line* v. *United States*, 228 F. 2d 344, *aff'd*, 230 F. 2d 75 (2d Cir. 1955), *aff'd as to admiralty jurisdiction*, 351 U.S. 976 (1956); *United States* v. *East Harbor Trading Corp.*, 190 F. Supp. 245 (S.D.N.Y. 1960).

[21] The district court below (R. 5-33), 202 F. Supp. 297, supplemental opinion, 210 F. Supp. 822 (D. Mass. 1962), and the court of appeals below (R. 247-60), 312 F. 2d 214 (1st Cir. 1963); *United States* v. *Eastport Steamship Corp.*, 216 F. Supp. 649 (S.D.N.Y. 1963, appeal argued November 21, 1963).

rate of division of the excess profits under 709(a) would be to render the statutory scheme for two items of charter hire meaningless. The effect of the rule contended for by the owner is that the Commission could fix the rate of the owner's share of the excess profits at any figure not less than 50% so long as the net result would be that the sum of the "charter hire reserved in the charter" and the "additional charter hire" would produce "such rate as the Commission determines to be consistent with the policies of this Act". If the entire amount payable under the charter party were indeed to be nothing but charter hire "at such rate as the Commission determines to be consistent with the policies of this Act," no intelligible purpose could be assigned to a statutory requirement that this amount be expressed in the charter party as the sum of an arbitrarily fixed "charter hire reserved in the charter" and an "additional charter hire" developed from the "charter hire reserved in the charter" among other factors.

The *Dichmann* reasoning was followed by the Court of Claims in *American Export Lines, Inc.* v. *United States* (*"American Export"*), 290 F. 2d 925, 930-31 (1961):

> We think it is clear that under the provision quoted above, the Commission was without authority to raise or lower the 50 percent of the excess profits which plaintiffs were required to pay as additional charter hire. This 50 percent share is a maximum as well as a minimum, at least insofar as section 709(a) is concerned. Dichman, Wright & Pugh, Inc. v. United States, supra; United States v. East Harbor Trading Corp., supra. That it was intended for the charterer to share fifty-fifty, no more and no less, is clearly apparent from the language of the statute.

> However, defendant argues that the sliding scale for payment of profit in excess of 50 percent was inserted in the charter contracts pursuant to its authority under section 5(b) of the Merchant Ship Sales Act of 1946, supra, to fix a rate of basic charter hire "consistent with the policies of this Act."
>
> This is contrary to the provisions of the charters. . . .
>
> * * *
>
> It [the charter] specifically provided for a basic rate of 15 percent, and such a rate was specifically authorized by statute. What was unauthorized by statute was the additional hire in excess of 50 percent.
>
> The following cases are in accord: Dichman, Wright & Pugh, Inc. v. United States, supra; United States v. East Harbor Trading Corp., supra. The power to fix the basic charter hire rate under section 5(b) was exhausted when the 15 percent rate was fixed by the contracts. It would appear that defendant's theory, that the sliding scale of from 25 to 40 percent of the excess profit constituted a portion of the section 5(b) basic rate, was an afterthought and not in the minds of the parties when the contracts were entered into.
>
> We are of the opinion that defendant had no authority to charge any amount as additional charter hire in excess of 50 percent of the cumulative net voyage profits.

In *American Mail Line, Ltd.* v. *United States* (*"American Mail Line"*), 213 F. Supp. 152, 163 (W.D. Wash. 1962, appeal pending), the court followed the holdings in *Dichmann and American Export, supra.* It further held that the Government could not properly rely on an administrative determination which Mari-

time had never made under section 5(b) to support the sliding scale charge actually made under section 709(a), even if it be assumed that such a determination were permissible under the former section.[22]

The most recent decision on the sliding scale issue is *American President Lines, Ltd. v. United States* ("*American President Lines*") (N.D. Cal., Oct. 10, 1963, Appendix A, pp. A1-A15). The court there concluded that the sliding scale was clearly contrary to the governing statutory provisions, stating (A4-A6):

> Section 5(b) begins by authorizing the Commission to fix charter hire "at such rate as the Commission determines to be consistent with the policies of this Act . . .". This grant of authority is then limited in three respects.
>
> The first limitation is that the rate of charter hire shall not be less than 15 per centum per annum of the statutory sales price, computed as of the date of charter, except upon the affirmative vote of no less than four members of the Commission. This limitation, contained in the first sentence of 5(b), is not involved in this case because the charter here requires a hire of at least the 15 percent requisite to avoid application of the limitation.
>
> The second limitation is to the effect that the rates of charter hire fixed by the Commission shall, if they "differ from the rate specified," not be less than the prevailing world market charter rates. This limitation, set out in the second sentence of 5(b), is not here involved because the rate provided in the charter does not so differ.
>
> The third limitation stems from the statutory declaration of Section 5(c) requiring that the pro-

[22] The court relied on *Bell* v. *United States*, 366 U.S. 393, 412 (1961). This and other similar cases are discussed *infra* pp. 41-42.

visions of Section 709(a) "*shall* be applicable to charters made under" Section 5(b) (emphasis added). The charter here is undeniably one made under Section 5(b). No one has suggested that there is any other authority for it, and there is none. It is plain, therefore, that the provisions of 709(a) apply. Congress could hardly have used language more clearly so requiring.

It is perhaps worthy of note here that, while the first two limitations upon the authority granted the Commission are stated as exceptions, the limitation imposed by Section 5(c) is stated positively and affirmatively through employment of the command "shall". It would hardly seem appropriate to treat a positive command as having less force in specifying a qualification upon a grant of power than a statement or statements qualifying that grant in the form of exceptions.

What, then, is the limitation upon the authority of the Commission thus made applicable by explicit command? It is a declaration in 709(a) which spells out in detail those provisions which must be included in "*Every charter made by the Commission* pursuant to the provisions of this title . . ." (emphasis added). When examination is made of the provisions which Congress had thus declared requisite to every charter made by the Commission, we find an unambiguous, carefully worded and easily understood statement that every charter shall provide that "the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum . . .". Congress was careful and exact in its designations in 709(a) as to what it meant by the terms used in the quoted phrase.

The two decisions which are not direct holdings but which tend to support petitioners' position are *Sword*

Line v. *United States*, 228 F. 2d 344, *aff'd*, 230 F. 2d 75 (2d Cir. 1955), *aff'd as to admiralty jurisdiction*, 351 U.S. 976 (1956), and *United States* v. *East Harbor Trading Corp.*, 190 F. Supp. 245 (S.D.N.Y. 1960).

In *Sword Line*, Judge Learned Hand, in dealing with the jurisdiction question, said (228 F. 2d at 346):

> On the other hand, if the statute [section 709(a)] did indeed limit the Commission to an even division of profits, it was the Commission's duty so to limit the libellant's promise; and we should not assume that the Commission would not have chartered the ships, unless it was to receive the unlawful hire. Obviously, we may impute to the libellant willingness to pay the lesser hire; so that it is proper to proceed as though there had been a contract for an even division, and nevertheless the Commission had compelled the libellant to pay more than the disputed hire. . . .

In *East Harbor*, Judge Kaufman said, with respect to section 709(a), (190 F. Supp. at 249):

> It is apparent that this section not only authorized, but required the parties to insert a provision in the charter for payment by the charterer of 50% of his profits to the government. And, as Judge Dimock held in Dichman, Wright & Pugh, Inc. v. United States, supra, this 50% share is a maximum as well as a minimum, at least insofar as section 709 is concerned. Cf. Sword Line, Inc. v. United States, 2 Cir., 1955, 228 F. 2d 344. Therefore, there is clearly no authority conferred by section 709 for the inclusion of that portion of the charter clause requiring payments in excess of 50% of profits.

The record before Judge Kaufman did not contain the minutes, memoranda, etc., of Maritime, but he was

of the opinion that if they showed that Maritime had relied on section 5(b) in fixing the excess portions of additional charter hire, the Government might be entitled to recover, but that if they showed that the charge was made under 709(a), it might not recover, stating (190 F. Supp. at 249):

> If, however, the parties mistakenly believed that authorization for the sliding scale could be found within section 709(a), and inserted this clause pursuant to that section, the defendant [steamship company] must prevail.

The minutes, etc., of Maritime show[23] that the excess charge was in fact made in reliance upon section 709 (a), and it may, therefore, be concluded that Judge Kaufman's decision would be that the sliding scale charges were contrary to the relevant statutes.

The three decisions upholding the legality of the sliding scale are those of the district court and court of appeals below, and *United States* v. *Eastport Steamship Corp.* (*"Eastport"*), 216 F. Supp. 649 (S.D.N.Y. 1963, appeal pending). Each of these decisions holds that section 5(c), incorporating section 709(a), fixed a minimum profit sharing formula only, and that the excess sliding scale charges were authorized by section 5(b). They accept the fact that Maritime purported to rely upon section 709(a) in fixing the sliding scale, but hold that such reliance was a matter of form and

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[23] See the discussion infra pp. 37-38, and the regulations and charter provisions on the foldout sheet attached hereto. Maritime's memoranda, minutes and telegrams to the charterers repeatedly identify the "basic charter hire" of 15 percent with section 5(b). They refer to the profit sharing hire, including the sliding scale portions, as "additional charter hire" following the language of section 709(a).

not substance, because it could have reached the same result if it had relied upon section 5(b).

The decisions are unanimous in holding that contract provisions purporting to modify the mandatory terms of the Merchant Ship Sales Act of 1946 are ineffective, and that the statutory terms prevail over and are substituted for the inconsistent contract terms. In addition to the cases cited above, see *United States* v. *Moore-McCormack Lines, Inc., supra,* 308 F. 2d 866, 873-74 (4th Cir. 1962), *cert. denied,* 372 U.S. 944 (1963); *Southeastern Oil Florida* v. *United States,* 119 F. Supp. 731, 734-35 (Ct. Cl. 1953), *cert. denied,* 348 U.S. 834 (1954); *A. H. Bull Steamship Co.* v. *United States,* 108 F. Supp. 95, 99 (Ct. Cl. 1952); *Nautilus Shipping Corporation* v. *United States,* 158 F. Supp. 353, 354-55 (Ct. Cl. 1958).[24] This principle applies whether or not there is a protest, and whether or not the right to contest the unlawful contract provision is reserved. In this case, however, there was both a protest and an express reservation.

C. The Legislative History Demonstrates That the Profit Sharing Plan Was Mandatory and That Section 709(a) Fixed Both a Floor and Ceiling in the 1946 Act

The court below recognized that section 709(a) fixed both a floor and a ceiling for purposes of the Merchant Marine Act, 1936 (R. 255, 312 F. 2d at 220), but it found that for purposes of the Merchant Ship Sales Act of

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[24] These cases also dispose of the contention of the Government that if the sliding scale is found to violate section 5, all of the charter terms are nullified and the parties are relegated to a *quantum valebat* situation under which the court may fix the reasonable value of the vessels. (See also 46 C.F.R. § 299.56(b)(5), quoted on the foldout sheet)

1946 the same section merely fixed a floor.[25] In reaching this conclusion, it recognized that there was no direct evidence (R. 257, 312 F. 2d at 221) of the intent of Congress in this respect, and it reached its conclusion for the reasons, first, that the 1946 Act showed a policy to prefer sales over charters, and, second, because the 1946 Act substituted negotiation of rates of charter hire for the competitive bid procedure contained in the 1936 Act. Neither of these reasons is sound, because the legislative history shows that both acts preferred the sale of vessels over charter (but both authorized chartering in broad terms) and both acts (not just the 1946 Act) contained provisions for the negotiation of charter hire rates.

The provisions of the 1936 and 1946 Acts relating to sale and charter of vessels are closely parallel. Each act commences with a substantially identical statement of policy: to develop and expand the merchant marine in private hands. (1936 Act, 46 U.S.C. § 1101; 1946 Act, 50 U.S.C. App. § 1735) Each authorizes a minimum rate of charter hire of "not less than" a fixed percentage of a selling price independently established. Section 714 of the 1936 Act (46 U.S.C. § 1204) provides that if essential trade routes cannot otherwise be successfully developed, Maritime may construct vessels and bareboat charter them to private steamship companies at negotiated rates "upon an annual charter hire of not less than 5 per centum of the price . . . plus 3½ per centum of the depreciated foreign cost com-

[25] The legislative history of the chartering provisions of the 1936 Act, confirming that a minimum and maximum profit sharing formula of 50 percent was contemplated, is contained in Appendix B, pp. B1-B9.

puted annually . . .'"[26] Section 5 of the 1946 Act (50 U.S.C. App. § 1738) provides for chartering at "not . . . less than 15 per centum per annum of the statutory sales price (computed as of the date of charter)." Under each act, section 709(a) was made a mandatory clause in the charters. (1936 Act, 46 U.S.C. § 1199(a); 1946 Act, 50 U.S.C. App. § 1738(c)) Thus if the decision of the court below is affirmed, Maritime will apparently be authorized under section 714 of the 1936 Act, to increase the profit sharing percentages fixed by section 709(a) in charters made in the future under that act.

By including the chartering provisions, Congress obviously recognized the importance of chartering in reconstruction of the private merchant marine. There are many comments in the legislative history as to the desirability of chartering, just as there are to the matter of preferring sales to charters (B9-B12). Section 7(a) (*supra* ftn. 3 p. 4) directed Maritime to prefer sales over charters only *"so far as practicable."* This does not reflect an inflexible or overriding policy. Furthermore, the safeguards which Congress thought adequate to prefer sales to charters were written specifically into the act. Section 5(a) of the act (50 U.S.C. App. § 1738(a)) provided that no vessel should be chartered until sixty days after Maritime had published the applicable sales price in order that purchasers might during that sixty day period select vessels for purchase before they were made available for charter.

Finally, the legislative history of the 1946 Act shows that the 15 percent rate adopted by Congress was

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[26] The 8½ percent floor was reduced to 7½ percent in June 1960. (See 46 U.S.C.A. § 1204, Annotations)

recognized to be a high rate, which in itself would discourage chartering and encourage sales.[27] The bareboat charter rate first proposed to Congress for the 1946 Act was not less than 8½ percent of the sales price, this percentage being the minimum set by section 714 of the 1936 Act, discussed *infra* p. 26.[28] Maritime later recommended to Congress that this be increased to 12½ percent.[29] As finally enacted, basic charter hire was fixed at "not less than 15 percent" of the adjusted statutory sales price. In discussing the 15 percent rate, Senator Radcliffe, who was in charge of the bill which became the Ship Sales Act, stated (91 Cong. Rec. 11873 (1945)):

> If the Government collects 15 percent for several years, the Senator can readily see that would be rather a substantial amount. The general opinion of those who have given this matter careful consideration is that the *15 percent is such a high rate that it will have rather a discouraging effect upon chartering rather than buying, and that runs all through the bill.*

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[27] The 15 percent rate was composed of 5 percent depreciation, 3½ percent interest, and 6½ percent profit to the Government, based upon the respective sales prices of the vessels chartered. (S. Rep. No. 807, 79th Cong., 1st Sess. pp. 13-14 (1945)) The profit portion of the hire for a Liberty-type vessel was, therefore, 6½ percent of $639,000, or $41,535 of the $95,850 annual basic charter hire. The 15 percent rate would return to the Government the full statutory sale price of a Liberty-type vessel if chartered for about six and two-thirds years, and the "floor" price in five and two-thirds years.

[28] See H. R. 4486, 78th Cong., 2d Sess. (1944) § 1(c).

[29] Hearings before the House Committee on Merchant Marine and Fisheries on H. R. 1425, 79th Cong., 1st Sess. pp. 452, 455 (March, 1945).

The following colloquy then ensued (*ibid.*):

> Mr. Hill. If they had to pay 15 percent for every year the ship was chartered, it might be we would get more for chartering a ship, if the charter were to run for several years, than if we sold the ship.
>
> Mr. Radcliffe. That is entirely true, and *that is one reason why we fixed the rate fairly high*, . . .

Senator Magnuson also made the following statement (91 Cong. Rec. 11552 (1945)):

> I do not think we are giving away anything. *I think a charter price of 15 percent is rather high*, . . .

Furthermore, the legislative history shows that Congress was concerned that the 15 percent rate was too high and that it would unduly restrict chartering. It therefore added the last sentence to section 5(b) to permit a lower rate of hire. The Senate report[30] on the Ship Sales Act stated:

> This rate of 15 percent conforms with the wartime practice of fixing bareboat use under War Shipping Administration operation at 15 percent of value for vessels built since 1937—a standard generally regarded as reasonable for the past . . . It is recognized that the value of the use may decline in the future because of the existence of tonnage in excess of world shipping requirements. *The Commission is given discretion by a vote of four to prescribe a lower rate*, subject to the limitation as to world charter rates.

The general policy of preferring sales over charters has not been regarded by any court other than the one

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[30] S. Rep. No. 807 (to accompany H. R. 3603), 79th Cong., 1st Sess. p. 14 (1945).

below to be sufficient grounds for reading the words "not less than" into the otherwise plain language of section 709(a). For example, in *American President Lines*, pp. A7-A8 the court said:

> Moreover, the requirement of equally dividing cumulative net voyage profit between the Commission and the charterer may well be advantageous to the government of the United States and serviceable to proper Congressional purposes. There are interlocking relationships between revenue from charter hire on the one hand and, on the other, costs of shipping, including costs of shipping which must be borne by governmental agencies. *While one purpose of the statute was to encourage sale over charter, there were other objectives calling for a balancing, such as, for example, encouragement of a thriving American Merchant Marine for the purposes of defense, full employment and the like.* The provisions of 709(a) requiring, in effect, that charterers should receive 50 percent of certain profits make good sense in that interest.

Problems encountered in the administration of the ocean mail contract subsidy program led Congress to restrict by most specific language the discretion of Maritime in the 1936 and 1946 Acts. Congress was asked by the Maritime spokesman to fix the principal financial terms to be included in the 1946 Act.[31] Sec-

[31] See the hearings before the Senate Committee on Commerce on S. 292, 79th Cong., 1st Sess. p. 98 (Sept. 14, 1945):

> Admiral Land. Yes; but we want to do it legislatively so there won't be any criticism, have the Congress put the ceiling and the floor. I am not looking for a Black investigation.
>
> Senator Brewster. You mean you don't trust yourself?
>
> Admiral Land. I don't trust myself nor my posterity. No, I certainly don't and all the history of maritime legislation going back to 1904 shows that we aren't worthy of being

tion 709(a) is an example of one of these specific terms.[32] It was the intention of Congress to circumscribe Maritime's discretion in order that the latter would be protected against pressures from the industry and from later accusations of favoritism; and, conversely, to protect the industry against arbitrary or discriminatory agency action.[33]

Under Maritime's bareboat charter, the charterer was required to pay basic charter hire, furnish and pay the crew, keep the vessel insured and in good repair, and redeliver it at the termination of the charter in the

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trusted, due to the conditions that arose, and that applies to the Congress as well as every man who was on this job before I was.

Senator Brewster. How is the Congress better able to do it, if you can't trust them?

Admiral Land. I do trust them. We give them the best information we have and they enact it, and then there won't be any investigation or any row with the Comptroller General or anybody else.

[32] See legislative history, Appendix B, pp. B12-B19.

[33] In *Nautilus Shipping Corporation* v. *United States*, 158 F. Supp. 353, 354-55 (Ct. Cl. 1958), the court said:

> The Merchant Ship Sales Act of 1946, *supra*, was an attempt on the part of Congress to provide for the sale of the Government's large accumulation of surplus ships at prices which could be calculated on the basis of a statutory formula. It was intended to relieve the Maritime Commission of the responsibility of haggling over prices, and of the criticism, embarrassment and possible scandal which might result if sales were individually negotiated. If that policy was to be carried out, the terms of the statute had to be adhered to, even though litigation might be necessary to determine the proper construction of a rather complex statute. That did not leave any room for individual bargaining for terms contrary to the statute, nor much room for the application of such doctrines as estoppel and acquiescence. . . .

See also *Sprague Steamship Co.* v. *United States*, 172 F. Supp. 674, 675 (Ct. Cl. 1958).

same good order and condition as when delivered, making allowances for ordinary wear and tear. The charterer also solicited the cargo, paid for loading and discharging, and directed the operations of the vessel. It assumed all risks of loss from the venture, including delays from labor difficulties, adverse weather conditions, congested ports, etc. Normally, the party bearing the risk of loss is entitled to retain all of the profits. Since Congress fixed a high basic rate of hire, there is no reasonable basis to assume that it meant to take away any more of the profits than section 709(a) clearly specified. Any interpretation which deprives the industry of the profits which it might use to expand the United States-flag merchant marine is clearly contrary to the statements of policy of both the 1936 and 1946 Acts.[34] The former act sought to build up a failing industry necessary for national defense, and the latter was designed to restore an industry torn by World War II.[35]

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[34] Section 101 of the Merchant Marine Act, 1936 (46 U.S.C. § 1101), and section 2(a) of the Merchant Ship Sales Act of 1946 (50 U.S.C. App. § 1735).

[35] The federal income tax laws similarly make the United States a participant in the profits of private industry, but no one would suggest that they should be construed to fix minimum rates, or to authorize the Internal Revenue Service to exact more than the statutory rates. In this connection, it should be pointed out that the 50 percent of profits retained by the charterers, as well as their 10 percent return on capital, are subject to income tax. Thus, in profit years the Government would effectively receive about 75 percent of the profits, even if section 709(a) fixed 50 percent as a maximum and minimum. If the profit sharing rate is 90 percent, the charterers' profits are minimal after income tax, and the incentive to expand shipping enterprises, develop trade routes, etc., is substantially undermined.

D. The Court Below Was in Error in Holding That Section 5(b) May Be Invoked Retroactively To Validate Unlawful Action Taken by Maritime in Reliance Upon Section 709(a)

Petitioners' primary contention is that the grant of authority to Maritime in subsection (b) of section 5 to fix charter rates was restricted by subsection (c) to a profit sharing provision containing the specific terms of section 709(a). Accordingly, the excess profit sharing provision would not have been valid even had Maritime purported to make an express finding under subsection (b) that such charge was "consistent with the policies of this Act, . . ." But, assuming for purposes of argument that a finding under subsection (b) might have been made, a review of the circumstances under which Maritime adopted the sliding scale demonstrates affirmatively that Maritime did not intend to fix the sliding scale excess shares under that subsection. It fixed them under 709(a), then rejected the protests of the industry that these shares were unlawful under that section, and made it clear by amendment to the charter and the issuance of regulations that the rights of the parties were reserved in respect of the dispute. The retroactive invocation of subsection (b) by the court below to validate the charge constitutes improper judicial reconstruction of agency action, which, as explained in the next point herein, adversely affects petitioners' substantive rights under the statute and the charter.

The records of Maritime show a clear understanding by that agency of the difference between the basic charter hire authorized by subsection (b) and the excess profit sharing charges fixed under subsection (c) incorporating section 709(a). In selecting the 15 percent rate as "consistent with the policies" of the act under subsection (b), several considerations were cited

by Maritime. Among these were (a) that declines were expected in the charter market because of competition by foreign-flag vessels being sold to noncitizens under the 1946 Act;[36] (b) that some types of vessels available for charter did not justify a rate in excess of 15 percent;[37] (c) that rates to shippers were controlled through conferences of American and foreign carriers whose rates were approved by Maritime;[38] (d) that

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[36] Memorandum to the Commission from the Acting Chief, Charter Section, dated August 7, 1946, entitled "Report on WSA Interim Chartering and Recommendations in Connection with Maritime Commission Chartering under the Ship Sales Act":

> With foreign nations having more tonnage available through sales of U. S. vessels, it is natural that rates will decline from the levels which have in the past necessarily been set by WSA for vessels operated by WSA whose expense of operation is greater than that for privately operated vessels. . . . (R. 48)

Minutes of the Maritime Commission dated August 9, 1946:

> Mr. Darr stated that with sales of ships being made to foreigners at a rapid rate the world market would be necessarily affected by low charter rates which foreign competitors have indicated will be placed in effect. . . . (R. 65-66)

[37] Report to the Commission of a Special Charter Committee dated August 8, 1946:

> The Committee is informed that there are certain types of "war-built" vessels available for charter that will not warrant a higher basic rate than 15% of the sales price. We also are informed that equitable basic rates in the various foreign trades will differ materially. . . . (R. 55)

[38] The August 7, 1946 report further states:

> The rates on general cargo carried by the berth services are practically all governed by the respective line group conferences, and while many of the berth services are highly profitable with the full cargoes and rates prevailing today, some berth services in some of the trades are not highly remunerative but are fraught with both operating risks and traffic risks. . . . (R. 49; see also R. 89-96)

since the Government had a monopoly on vessel tonnage it controlled world market charter rates through that monopoly;[39] and (e) that Maritime was able to control the level of rates through its power to approve in advance voyage charters and contracts of affreightment.[40]

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[39] As the court said in *American-Foreign* (291 F. 2d at 602):

> During the Second World War the United States Government, not surprisingly, had a virtual monopoly on the ownership of all floating vessels. . . .

The McDaniel affidavit states (R. 143):

> The committees on which I served began to realize that the United States, *having control of the great bulk of the world tonnage, also controlled the world market*, and that too low charter rates would permit undercutting on freight rates with extremely harmful results to pre-war American owners and post-war American vessel purchasers who were trying to establish themselves.

[40] A government affidavit filed in *Smith-Johnson Steamship Corp. v. United States*, 142 F. Supp. 367 (Ct. Cl. 1956) states:

> The Commission also approved the application of WSA Bareboat Charter Regulation No. 3 to Commission charters, with certain modifications. It was to continue to require the filing of voyage charters and contracts of affreightment with the Commission, the compliance with conference or WSA rates (except coal and grain rates established in WSA Bareboat Charter Regulation No. 1 and except full, bulk cargoes not hand stowed), the limiting of commissions, the refusal to charter additional vessels for 60 days after a redelivery with exception of redeliveries off berth for more suitable substitutions, and the limiting of sub-time chartering to that approved by the Commission "*at current market time charter rates* for American vessels as determined by the Director of Traffic," copies of the sub-time charters to be submitted for approval. . . . (Emphasis in original affidavit) (p. 57a)

A letter of award of a War Department charter made in circumstances substantially identical with petitioners' War Department charters (R. 39) was introduced as an exhibit in *American Export*

The record also reveals another important reason for Maritime's not wishing to act under subsection (b) of section 5 to increase the 15 percent basic hire in lieu of imposing the sliding scale rates. This was that such an increase would be passed on to the Government either by increases in rates for the movement of government cargoes, or under clauses in subcharters with other government agencies providing that any increase in the 15 percent basic rate would be paid by the government agencies concerned.[41]

Lines, Inc. v. *United States*, *supra*, 290 F. 2d 925 (Ct. Cl. 1961). It pointed out that these charters were made at rates less than the commercial market:

> The per diem rate of $1,515 while in port and $1,765 per day while at sea, was arrived at after consideration of operating costs determined after careful study by the Maritime Commission, this office, and examination of reports of various commercial operators. The formula and the rate arrived at have heretofore been approved by your office. *This office is in constant touch with brokers and operators and has formed its best judgment as to the commercial charter rates which are substantially higher than the rate contained in the proposed contract.*

[41] As Judge Beeks found in *American Mail Line* (213 F. Supp. at 162, ftn. 13):

> Maritime considered increasing the basic charter hire rate of 15 percent per annum of the statutory sales price but did not do so because of protests from other governmental agencies, the Army and the State Department. These agencies had subtime/voyage/space charters with various operators containing escalation clauses providing that if the operators' basic hire was increased by Maritime, the rate of hire specified in the subcharter would be adjusted accordingly.

Petitioners time chartered two of the vessels to the War Department under conditions which would require the latter to pay any increase in the basic 15 percent rate of hire (R. 39).

The McDaniel affidavit in *Smith-Johnson*, *supra*, states in part:

> Other Government agencies vigorously objected to the long-range plan. *The Army requested that no increase be made in*

Concerning the fixing of the profit sharing terms, the records of Maritime show a direct concern with and reliance upon the language of section 709(a).[42] The parallel language of the statute, regulations and charter provisions set forth on the foldout sheet shows that Maritime was not relying, and did not intend to rely, upon subsection (b) of section 5 in fixing the

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[the 15 percent] *basic charter hire* since Army appropriations for the fiscal years ending June 30, 147 [sic] and 1948 could not absorb such an increase under the clause in the Army's sub-time charters of vessels under the Form 303 charter to the effect that if the basic charter hire under the Form 303 charter is increased or decreased the rate of compensation specified in the Army subtime charters

will be adjusted in the amount that such basic charter hire is greater or less than 15 percent per annum on the estimated statutory sales price.

(See March 13, 1947, Helmbold to Commission; March 6, 1947, Chief of Army Transportation to Commission Chairman.)

The *State Department also demurred to the increase* for fear of resultant increases in freight rates, which, it was stated, then accounted for 26 percent of the value of the cargo carried (April 3, 1947, Commission minutes) . . . (p. 93a)

[42] Maritime's memoranda and minutes repeatedly refer to an increase in the rate of "additional charter hire," a term found only in section 709(a). See the August 8, 1946 memorandum (R. 56):

All of the Committee members, except one, agree that the *additional charter hire of 50% of the profits in excess of 10% of Capital necessarily employed in the business should be increased.* A minority of the Committee, however, feel that the revised percentage being recommended is too high.

A telegram to charterers was proposed, as follows (R. 63):

3. THE *ADDITIONAL CHARTER HIRE* PAYABLE TO THE OWNER WILL BE NINETY PERCENT OF THE NET VOYAGE PROFIT IN EXCESS OF THE TEN PERCENT PER ANNUM ON CHARTERER'S CAPITAL NECESSARILY EMPLOYED *INSTEAD OF FIFTY PERCENT* [IN THE INTERIM CHARTERS] *AS HERETOFORE.*

excess shares, but was merely increasing the profit sharing percentage contained in section 709(a).

These separate statutory determinations were reflected in the telegram by which the petitioners were notified of the charter terms, as follows (R. 204):

> 2. THE RATE OF BASIC HIRE WILL BE AT RATE OF FIFTEEN PER CENT PER ANNUM OF EITHER THE UNADJUSTED STATUTORY SALES PRICE OR THE FLOOR PRICE OF THE VESSEL, WHICHEVER IS HIGHER.
>
> 3. THE ADDITIONAL CHARTER HIRE PAYABLE UNDER AND DURING THE PERIOD OF THE FLEET CHARTER SHALL BE (a) 50 PER CENT OF THE AVERAGE NET VOYAGE PROFIT UP TO THE FIRST $100 PER DAY IN EXCESS OF 10 PER CENT OF CHARTERER'S CAPITAL NECESSARILY EMPLOYED IN THE BUSINESS, AND (b) 75 PERCENT OF THE NEXT $200 PER DAY, AND (c) 90 PER CENT OF ALL NET VOYAGE PROFITS IN EXCESS OF $300 PER DAY.

There was no acquiescence in the unlawful action, nor was Maritime misled by the charterers in any respect. The charterers, through their industry associations, promptly protested the sliding scale upon the specific ground that section 709(a) precluded the excess shares.[43] The district court recognized these

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[43] The protest of the Ship Operators Association, Inc., introduced as an exhibit by the United States in the *Smith-Johnson* case referred to *supra*, which was forwarded to Maritime on August 15, 1946, read in relevant part as follows:

> 2—RESOLVED, that it is the consensus of opinion of the members of this Association that the recapture of the profits under the proposed form of bareboat charter is not commensurate with the risks which the charterer assumes under his charter party and the Association under Title 7 Section 709 of the Merchant Marine Act of 1936 questions the legality of the Commission's right to recapture more than 50% of the net

protests,[44] and the Government conceded in *American-Foreign* that the charters were amended in recognition of the protests.[45] The rights of the charterers,

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voyage profits in excess of 10% per annum and in behalf of its members the Association, reserves all rights under such section.

The McDaniel affidavit in *Smith-Johnson, supra,* stated in part:

> By telegram of August 15, 1946, the Committee of the Whole, representing the American Merchant Marine Institute, Inc. (herein called "AMMI"), the Association of American Shipowners, the Pacific American Steamship Association, and the Shipowners Association of the Pacific Coast stated the unanimous opinion that
>
> proposed rate of additional charter hire exceeds rate authorized by applicable law. (p. 51a)

[44] R. 13 and 202 F. Supp. at 302-303:

> 6. Eastern has continuously since August 15, 1946, when it joined with other members of the American Merchant Marine Institute, Inc. in a telegram to the Commission, protested that the rates of so-called "additional charter hire" specified in Part II Clause 13 of the standard contract exceed the rate authorized by applicable law. Although Eastern executed Contract No. MCc-41881, including Part II Clause 13, and made payments pursuant thereto, it has always relied on the Commission's assurance in Supplement 8 to General Order No. 60, particularly 46 C.F.R. 299.31(k)(1), that "neither the tender" of payments "by the charterer, nor its acceptance by the Commission, shall prejudice the rights of either under the applicable bareboat charter agreement or otherwise."

[45] The Government's brief to the Court of Appeals in *American-Foreign* dated November 29, 1960, stated:

> The terms of the re-written agreement (on the protest of the charterers so as to make clear that they could sue at once) ....
>
> • • • •
>
> Because of the dispute as to possible violation of the statutes, Maritime changed the language [of the charter] to make it even clearer that suit should be filed at once.
>
> • • • •
>
> The form 303 (*as modified above because of the charterers'*

accordingly, must be judged on the basis of what the agency actually did, not what it could have done.

The court below was clearly wrong in relying upon a presumption of regularity, which is contradicted by the record, and in affirming what was done under the doctrine that an appeals court may affirm a district court for being right but for the wrong reason (R. 252). The statute here relevant imposes limitations upon the substance of agency action as well as the method under which that action is exercised. The courts may set aside agency action which conflicts directly with statute, but they may not correct retroactively defects in agency procedure which have been protested, and which affect substantive rights.

Petitioners not only contend that Maritime transcended the statutory limitation upon the substance of the action it took in modifying the fifty-fifty profit

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protests) was duly executed by each appellant here under further protests. (pp. 46, 48 and 49)

See also *American Mail Line, supra*, 213 F. Supp. at 157.

On May 14, 1951, Maritime sent a circular letter to all charterers, stating (R. 98):

> Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is *on account* of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise. [The phrase "on account" emphasized by Maritime.]

sharing requirements, but they also contend that even if the sliding scale could be considered to be within the scope of the authority granted by subsection (b) of section 5, Maritime's failure to make the statutory determination in the manner contemplated by that section creates a defect which cannot be cured by the court. The petitioners' rights must be judged solely in the light of the action taken by Maritime and not by a hindsight view of what Maritime might have done. As was said in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947):

> When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

And more recently in *Bell* v. *United States*, 366 U.S. 393, 412-13 (1961), this Court said:

> The simple fact is that no such administrative determination has ever been made. . . . The Army cannot rely upon something that never happened, upon an administrative determination that was never made, even if it be assumed that such a determination would have been permissible under the statute and supported by the facts. . . .

In *Vitarelli* v. *Seaton*, 359 U.S. 535, 546-47 (1959), in the separate opinion by Justice Frankfurter it was pointed out:

> An executive agency must be rigorously held to the standards by which it professes its action to

> be judged. See Securities & Exch. Com. v. Chenery Corp. 318 US 80, 87, 88, 87 L ed 626, 632, 633, 63 S Ct 454. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. See Service v. Dulles, 354 US 363, 1 L ed 2d 1403, 77 S Ct 1152. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.

And most recently in *Burlington Truck Lines* v. *United States,* 371 U.S. 156 (1962), this Court held that it "may not accept appellate counsel's post hoc rationalizations for agency action." See also *NLRB* v. *Atlanta Metallic Casket Co.,* 205 F. 2d 931, 936 (5th Cir. 1953):

> With regard to the suggestion that the Board in its discretion might have insured the validity of the present proceedings and order by filing either a new or later complaint, we deem it appropriate to observe that the jurisdictional issue can properly be resolved only in the light of the action taken, and not by a hindsight view of what the Board might have been authorized to do had its discretion been lawfully exercised. The Board, like all statutory and administrative agencies, is governed strictly by the statute from which it derives its existence, and equitable considerations in support of its jurisdiction are inappropriate for judicial inquiry where such jurisdiction was not properly invoked or does not otherwise exist.

Thus, judging the propriety of Maritime's action upon the grounds invoked by it to support the sliding scale charge, that charge cannot be sustained.

E. If the Excess Profit Percentages Are Authorized by Section 5(b), They Must be Deducted before Computing the 50 Percent Due under Section 709(a)

To show that the charterers' position does not (as the court below suggested) involve a matter of form rather than substance, petitioners refer to the different method of accounting for additional charter hire which must be followed if the sliding scale charge were adopted under subsection (b) of section 5, or if it were determined that the charge might be retroactively validated under subsection (b) although in fact made under section 709(a).

Section 709(a) provides that the equal division of profits is to be made "*after payment of the charter hire reserved in the charter . . .*". The "charter hire reserved in the charter" is the type of charter hire fixed under section 5(b). If the 25 and 40 percent portions of profits in excess of 50 percent had been fixed, or may now be justified, under section 5(b) then these portions (just as the 15 percent basic hire) must be deducted before dividing the remaining profits equally under section 709(a). A computation on this basis results in petitioners' additional charter hire being reduced by one-half of the 25 and 40 percent portions of additional hire claimed by the Government.[46]

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[46] The computations are contained in the supplemental affidavit of Robert Caswell (R. 40-43). This reduction in hire would be sufficient to eliminate entirely the claim of $64,000 asserted in the Government's cross-libel.

This result can most easily be illustrated by pointing out that for each dollar of additional hire in the 90 percent bracket, the 40 percent charged under section 5(b), or 40¢, would first be paid to Maritime as "charter hire reserved in the charter," and then the remaining 60¢ would be divided fifty-fifty, giving Maritime a further 30¢. This would result in profit sharing hire of 70¢ out of each dollar, instead of the 90¢ extracted under Maritime's form of charter, which disregards the statutory plan of sections 5(b) and 709(a).

Unless this is done, there is a further clear departure from the statutory plan set by section 5.

The Government in earlier cases admitted[47] that this accounting adjustment was required under the statutory formula set by sections 5(b) and 709(a). It even computed the exact amounts of the 25 and 40 percent hire which should be deducted in the present case as "charter hire reserved."[48] When it was pointed out,

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[47] In the Court of Claims, in its reply brief filed January 23, 1961, in *New York & Cuba Mail Steamship Company* v. *United States*, 290 F. 2d 925 (1961), the Government stated:

> Plaintiff next criticizes the Government's position by asserting (reply memorandum, p. 10) that the 25 and 40 percent portions of additional charter hire should have been deducted before computing the statutory 50 percent portions. *The Government agrees with this contention* but points out that it goes only to the proper method of accounting for charter hire and not to the merits of the Government's claim. (p. 15)

[48] The Government's brief filed November 22, 1960, in the district court stated, without equivocation:

> Eastern Gas regularly paid the Clause C.(1) "fixed" or "basic" hire stipulated in the charters. And on March 31, 1947, Eastern Gas submitted a typical preliminary accounting for "additional charter hire" (Exhibit L 2) due under Clause 13. That tentative accounting indicated that $10,020.00 was then due the Commission as total profit sharing and clearly showed *said sum to be composed of $5,010.00 due as 50% statutory additional charter hire under section 709(a), a further $1,550.00 due as 25% contractual additional charter hire, and a further $1,683.00 due as 40% "percentage lease" or contractual additional charter hire* under the sliding scale excessive profit sharing provision of Clause 13 (Exhibit L 2). (pp. 17-18)
>
> • • •
>
> As shown by the affidavits of Charlie H. McDaniel and former Commissioners Raymond S. McKeough, John M. Carmody and William Ward Smith, 50 percent "additional charter hire" provided for in [a] above was the required minimum *statutory* additional charter hire of section 709(a). *And, as that*

however, that this would affect the amount of additional charter hire, it submitted a lengthy affidavit which had been filed in another case (R. 122-135), stating that the excess portions of additional charter hire, originally alleged to be 25 and 40 percent, should be recomputed, upon the basis of complex mathematical formulae at 50 and 80 percent of the amount in excess of 50 percent, so as to produce the same result as that reached by taking a flat 50-75-90 percent of profits without prior deduction of any part thereof.

The Court of Claims in *American Export* (291 F. 2d at 931) and Judge Dimock in *Dichmann* (144 F. Supp. at 926) recognized that any charge made under section 5(b) would have to be first deducted before computing additional charter hire due under section 709(a), and that Maritime's failure so to provide clearly showed that no part of the sliding scale was in fact charged under section 5(b).

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affidavit explains, the further "additional charter hire" provided for in [b] and [c] above was a combination of the same 50 percent minimum required under 709(a) with added contractual elements of 25 and 40 percent prescribed under section 5(b). Thus, the added 25 and 40 percent portions (of the 75 and 90 percent items) of the [b] and [c] "sliding scale" of additional charter hire, together with the "basic charter hire," constituted the total contractual "charter hire" authorized to be charged by section 5(b). (Emphasis on *statutory* supplied by the Government)

It results that the combined firm or "basic hire" and the 25 and 40 percent portions of [b] and [c] constituted the total "charter hire reserve in the charter" as referred to in section 709(a). Never has the Government contended that the 25 and 40 percent portions of the 75 percent and 90 percent sliding scale which Eastern Gas attacks was charged under section 709(a) or otherwise than under section 5(b). (pp. 57-58)

The district court below avoided the Government's affidavits by holding that the statutory phrase "charter hire reserved in the charter" was intended to refer only to a fixed, but not to a contingent charge, such as a share of profits, made under section 5(b). It suggested that the language "charter hire reserved" should not be read literally insofar as the sliding scale was concerned, because the incorporation of section 709(a) into the 1946 Act was a "typical patch-work job." (R. 20; 202 F. Supp. at 306)

The court of appeals below misunderstood the charterers' argument with respect to the "charter hire reserved" language of section 709(a). It said that the logical conclusion of the argument was that not only the 25 and 40 percent portions in excess of 50 percent, but also the 50 percent profit payment, would have to be deducted as "charter hire reserved in the charter" before division of the remaining profits (312 F. 2d at 211). This conclusion does not follow however. Only that part of the profits in excess of the 50 percent which have their statutory basis in section 5(b) are to be deducted. The 50 percent portion admittedly has its statutory basis in section 709(a).

It is submitted that the reason why the language "charter hire reserved in the charter" in section 709(a) does not refer to a profit sharing arrangement, is that the only profit sharing arrangement contemplated by both the 1936 and 1946 Acts was that contained within the confines of section 709(a).

II. THE ADDENDUM TO THE CHARTER DIVIDING THE YEAR 1947 INTO TWO PARTS AS OF SEPTEMBER 1 VIOLATED THE CALENDAR YEAR ACCOUNTING REQUIREMENTS OF SECTION 709(a) AND WAS THEREFORE INEFFECTIVE

A. The Facts Demonstrate That the Addendum Was Not a Separate Charter But Was Imposed for the Sole Purpose of Changing the Calendar Year Accounting Plan Specified in Section 709(a)

As hereinabove recited, in mid-1947 a decline occurred in shipping and Maritime became concerned lest its excessive shares of profits accrued during the early part of that year be diluted by losses anticipated later in the same year. Accordingly, on August 15, 1947, it notified the charterers (R. 27) that their continued use of government vessels would be terminated in accordance with the fifteen days' notice provision contained in the charters, but that they would be given an opportunity to continue the use of the vessels under conditions to be announced. On August 20, 1947, Maritime informed the charterers that the vessels might be continued under charter, providing the charterers would agree within seven days to sign an addendum by which the calendar year 1947 would be divided into two parts for accounting purposes, as of September 1 (R. 28). Such an addendum (called the "Foreign Trade Addendum") was executed by petitioners, effective September 1, 1947, embodying the foregoing (R. 198-200).

The Government contends that Maritime had an absolute right to terminate the original charters under clause 14 (R. 184), that the addendum was in fact a separate charter, and that the divided accounting was properly imposed by threatened exercise of that right.[49]

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[49] The Foreign Trade Addendum was upheld as a separate charter in *American President Lines, Ltd. v. United States*, Appendix A, pp. A11-A12.

The district court below treated the Government as being in the same relation to the charterers as landlord to tenant, analogizing that a landlord might exercise his power to terminate a lease even if the purpose was to obtain a higher rental from the same tenant (R. 33). The court of appeals below did not follow this reasoning, but held the divided accounting lawful, on the same ground which it adopted in upholding the sliding scale. This was that section 709(a) should be construed to set minimum terms for the benefit of the Government, and that Maritime was empowered under subsection (b) of section 5 of the 1946 Act to change the calendar year accounting provisions to the detriment of the charterers (R. 259-60).

There is no dispute about the objective of Maritime in seeking the divided accounting. It is described in its annual report to Congress for the fiscal year ended June 30, 1948, as follows:

> On August 15, 1947, notice of termination was served on all bareboat charterers of Maritime Commission vessels effective September 1, 1947, subject to continuance under the following terms and conditions:
>
> 1. The rate of basic or additional charter hire remained unchanged.
>
> 2. The time limit of the charter was to be extended for a period of about 6 months, but no voyages were to commence after February 29, 1948, subject to termination on 15 days' notice by either party after 60 days from September 1, 1947, or from the date the vessel was delivered to [by] the Commission thereafter.
>
> 3. Payment of additional charter hire was to be computed separately for those voyages which began prior to September 1, 1947, and for those

which began under the amended terms of the charter agreement.

This action was designed to require the charterer to carry on all operations after August 31, 1947, without offsetting future losses against additional charter hire due the Government, from voyage profits for the prior period. . . (pp. 13-14)

That the Foreign Trade Addendum was not a "separate charter" is clearly apparent from the fact that it was an "addendum" to an existing charter, and was only to be "treated for accounting purposes *as if* it constituted a separate charter" (R. 198-200). Further, as its preamble notes, although a termination notice was served under the original charter, the charterers were "simultaneously advised" that they would be given an opportunity to continue the use of the vessels.

None of the events which are characteristic of a new charter took place. The vessels were not redelivered and their use was uninterrupted. No redelivery surveys were made, no redelivery repairs performed, and no inventory taken, as contemplated by the original charter. (See standard clauses at 46 C.F.R. § 299.130) Furthermore, in accounting for additional charter hire, the reserves which the charterers carried on their books for potential repair expenses and insurance losses which they expected to incur at the time of redelivery, together with other expenses which could not be allocated to a specific voyage or accounting period, were spread over the entire term of the charters both before and after September 1, 1947. (46 C.F.R. § 299.35, 299.50(b), 299.51 and 299.52(c))

As further evidence that Maritime was not seeking a bona fide termination of the charters, the Foreign

Trade Addendum provided that the charterers might not thereafter exercise the right of termination under clause 14 of the original charters before the expiration of sixty days from the effective date of the addendum on September 1, 1947 (R. 198-99). Thus, if pre-September 1 subcharter commitments were completed early in this sixty-day period, the vessels would have to be maintained in idle status at considerable expense to the charterers (including payment of "basic charter hire") until that period expired.

In summary, all of the terms of the original charter continued as before except for the divided accounting in 1947. The Foreign Trade Addendum was not "a separate charter," but a continuation of an existing charter. Its sole purpose was to create two accounting periods during the calendar year 1947 for computing additional charter hire.

B. Section 709(a) Prescribed a Mandatory Calendar Year Accounting Period

Section 709(a) provides for the computation of additional charter hire.

> . . . *whenever, at the end of any calendar year subsequent to the execution of such charter,* the cumulative net voyage profits . . . shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, . . .

This language plainly requires a computation based upon the period commencing with "the execution of such charter" and terminating with "the end of any calendar year" subsequent thereto. Hence, when operations under a charter commence during and extend beyond the end of any given calendar year, the

first computation is made at the end of that year. Similarly, when operations extend over a period of years, a computation is made at the end of each calendar year.[50]

The legislative history makes it clear that one of the purposes of Congress in adopting section 709(a) and related sections of the 1936 and 1946 Acts was to modify insofar as possible the impact of the abnormal cyclical fluctuations which were characteristic of the shipping business. It intended that periods of profits and losses should be averaged for purposes of computing "additional charter hire" under section 709(a) as well as for purposes of recapture of profits by the Government under operating-differential subsidy agreements. Thus, at the hearings which preceded enactment of the 1936 Act, a spokesman for the industry said:[51]

> The shipowner has got to have a possible hope of accumulating earnings and reserves in the good

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[50] The term "net profits" used without qualifying language normally implies a calendar year computation. *Laystrom* v. *Continental Copper and Steel Industries*, 133 F. Supp. 130, 133 (N.D. Ill. 1955), *aff'd*, 244 F. 2d 504 (7th Cir. 1957). Here, section 709(a) expressly fixes the calendar year basis and nothing is left to implication. The Government concedes that the term "net profits" in section 709(a) requires a combining of the results of profits and losses from all voyages terminated within each calendar year. See petition for certiorari of the Solicitor General in *United States* v. *Moore-McCormack Lines, Inc.*, No. 862—October Term, 1962 (pp. 10-11). The purpose of the word "cumulative" in section 709(a) was to require the offset of profits in one calendar year against losses in other years over the term of any charter to which that section applies. *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866, 871 (4th Cir. 1962), *cert. denied*, 372 U.S. 944 (1963).

[51] Hearings before the Senate Committee on Commerce on S. 2582, 74th Cong., 1st Sess. p. 167 (1935).

periods to make up the losses in bad periods. It is a business of peaks and hollows.

This observation was confirmed by Senators White and Fletcher in the same hearings, as follows (*id.* at 318-19):

Senator White. Otherwise, in the fat years, you could not make provisions for the lean years.

Mr. Smith. In fat years you are turning money back, and in lean years you are taking a loss.

Senator White. If you cannot make provision in the fat years for the lean years, which are inevitable, you cannot get ahead.

Mr. Smith. That is true.

Senator Fletcher. In other words, you want to make it attractive to private capital to invest in shipping?

Mr. Smith. Yes.

Section 606(5) of the 1936 Act originally provided for offset of profits and losses over a five-year period in computing recapture under subsidy agreements but Congress in 1938[52] increased this period to ten years.

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[52] Section 606(5) of the 1936 Act, as amended by Act of June 23, 1938, c. 600 § 22, 52 Stat. 960 (46 U.S.C. § 1176), provides:

> that when at the end of any ten-year period during which an operating-differential subsidy has been paid under a contract or consecutive contracts . . . if the net profit of the contractor on his subsidized vessels and services incident thereto during such period or time . . . has averaged more than 10 per centum per annum upon the contractor's capital investment necessarily employed in the operation of the subsidized vessels, services, routes, and lines, the contractor shall pay to the United States an amount equal to one-half of such profits in excess of 10 per centum per annum as partial or complete reimbursement for operating-differential subsidy payments . . .

The Senate committee report explaining this amendment stated (S. Rep. No. 1618, 75th Cong., 3d Sess. p. 15 (1938)):

> A study of the financial history of the steamship business indicates that such incidents are characteristic of the industry. Profits, while large in some instances and in others enormous, during prosperous periods, are usually counterbalanced by equally large or enormous losses in depression years. The proposed amendment recognizes this fact, and adapts the recapture provisions to the cyclical nature of the industry.

Since section 709(a) was modeled after the subsidy recapture provisions, it is fair to attribute the same purpose to both[53] and Maritime's action in requiring separate accountings for profitable and unprofitable periods clearly frustrates this purpose. If Maritime has the power to modify the calendar year accounting provisions of section 709(a) or the subsidy recapture provisions in the 1936 and 1946 Acts, it will undermine this clearly expressed congressional policy.

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[53] The provision for calendar year accounting originated in section 530 of S. 3500, 74th Cong., 2d Sess. (1936). (Committee Print of March 3, 1936) (the Copeland bill). Similar language was also contained in section 35 of S. 4110, 74th Cong., 2d Sess. (1936) (the Guffey bill print of February 24, 1936). That print of the Guffey bill contained a chartering provision (Appendix B, pp. B1-B2) which specified no accounting period for the determination of profits from charters, and also contained subsidy recapture provisions paralleling those of the Copeland bill, including calendar year accounting. The print of the Guffey bill containing section 709(a) in the form in which it was finally enacted (section 47 of S. 4110, Committee Print of March 30, 1936) contained parallel provisions for subsidy recapture and additional charter hire, both calling for calendar year accounting. See *United States* v. *Moore-McCormack Lines, Inc.*, *supra*, 308 F. 2d at 872, ftn. 13.

In *United States* v. *Moore-McCormack Lines, Inc., supra,* Maritime sought by regulation to eliminate the year-to-year cumulation of profits and losses under a charter similar to that of petitioners, and the court pointed out that Congress intended that calendar year profits and losses should be offset against each other over the entire period of the charter, irrespective of the sequence in which they occurred, because of the cyclical nature of the shipping business (308 F. 2d at 873).

The court below relied upon subsection (b) of section 5 as justifying the change in the calendar year requirement of section 709(a). But the language of the former section can hardly be interpreted to empower the Commission to fix an accounting period, or to modify the period set by section 709(a). Section 5(b) says that "charter hire . . . shall be fixed by the Commission *at such rate* as the Commission determines to be consistent with the policies of this Act, but . . ." etc. The establishment or changing of a statutory accounting period does not have any logical relation to the fixing of a "rate" of the type authorized or contemplated by section 5(b).

Nor may the power to change the accounting period be inferred from the policy to encourage sales over charters which was relied upon by the court below in sustaining the sliding scale. Since the Foreign Trade Addendum was imposed in the face of a declining freight market, it could not induce this result.

C. The Foreign Trade Addendum Was Ineffective to Overcome the Statutory Requirement of Calendar Year Accounting

The circumstances recited above show that there was in fact no real termination of the charter and that Maritime gave notice of termination only for the purpose of circumventing the statutory requirement for calendar year accounting. The addendum was contrary to the express provisions as well as to the underlying policies of the 1936 and 1946 Acts and served no business or regulatory purpose. For purposes of section 709(a), the charter must be treated as one contract. The case is analogous to the cases where transactions having a tax avoidance motive and no legitimate business purpose have been treated as ineffective. *Gregory* v. *Helvering*, 293 U.S. 465 (1935); *Harrison* v. *Schaffner*, 312 U.S. 579, 582 (1941); *Commissioner* v. *Court Holding Co.*, 324 U.S. 331, 334 (1945). It has also been held that a clear contract right, as the right here to terminate the charters, may not be used as part of a scheme to accomplish a forbidden result. *Fidelity & D. Co.* v. *Tafoya*, 270 U.S. 426, 434 (1926). See the Ship Sales Act cases cited *supra* at p. 25, and *Clapp* v. *United States*, 117 F. Supp. 576 (Ct. Cl. 1954), *cert. denied*, 348 U.S. 834 (1954); *Suwannee Steamship Co.* v. *United States*, 279 F. 2d 874 (Ct. Cl. 1960); *Seatrade Corp.* v. *United States*, 285 F. 2d 448 (Ct. Cl. 1961). Thus, steamship companies have the power (with Maritime's approval) to enter into rate fixing agreements, but they may not exercise the power for the purpose of violating the statutory prohibition against driving an independent competitor out of the trade. *FMB* v. *Isbandtsen Co.*, 356 U.S. 481 (1958). Similarly, a seller has the power to sell his product to whomever he chooses at whatever price, but he may

not exercise the power for the purpose of effecting a violation of the anitrust laws. *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155 (1951). As was said in *United States* v. *San Francisco*, 310 U. S. 16, 28 (1940):

> Terminology of consignment . . . , rather than . . . sale, and verbal description of the power company as the City's agent or consignee, are not sufficient to take the actions of the parties under the contract out of § 6. . . . The City has in fact followed a course of conduct which Congress, by § 6, has forbidden. Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law.

The district court's analogy to a landlord's termination of a tenancy for the purpose of raising the rent is not appropriate. A closer analogy would be a purported termination and renewal of a tenancy for the sole purpose and with the sole effect of evading a rent control law.

It is furthermore obvious that there was coercion exercised over the petitioners in the execution of the Foreign Trade Addendum because of pre-existing subcharter commitments for the vessels (R. 237). Some of these subcharters had been specifically approved by Maritime prior to the notice of termination on August 15, 1947 (R. 30-31). These subcharters would have been excused only if Maritime had terminated the bareboat charter in a manner which would "frustrate the performance" of the subcharters (see clause 29, R. 32). There was, however, no true termination of the bareboat charter since petitioners were per-

mitted to continue the use of the vessels, but on less favorable terms. These voyages were scheduled for imminent loading, the freight rates were favorable to the subcharterers, and the latter would certainly not relieve petitioners from liability for damages for breach of the subcharters simply because the bareboat charter terms had become more onerous. *Columbus Ry P. & L. Co.* v. *Columbus*, 249 U.S. 399, 419 (1919); *Texas Co.* v. *Hogarth Shipping Co.*, 256 U.S. 619, 630 (1921); *Gulf, Mobile & Ohio R. Co.* v. *Illinois Central R. Co.*, 128 F. Supp. 311, 323-24 (N.D. Ala. 1954), *aff'd*, 225 F. 2d 816 (5th Cir. 1955), *cert. denied*, 350 U.S. 932 (1956).

However, irrespective of coercion, petitioners may properly contest the effectiveness of the addendum because the regulations in existence at the time, hereinabove cited in ftn. 10, said that the statutes were controlling and the rights of the parties were reserved "under the applicable bareboat charter agreement or otherwise."

For the foregoing reasons, the Foreign Trade Addendum should be disregarded and the year 1947 accounted for as a single calendar year in accordance with the requirements of section 709(a).

III. CONCLUSION

Petitioners respectfully request this Court to find and determine:

(a) That petitioners were not obligated to pay "additional charter hire" in excess of 50 percent of their net voyage profits derived from operation of the chartered vessels after a 10 percent return on capital;

(b) Alternatively, that if the 25 and 40 percent portions of additional charter hire are lawful, said

excess portions of additional charter hire must be deducted as "charter hire reserved in the charter" within the meaning of section 709(a), before computing the fifty-fifty division of remaining profits due the Government;

(c) That the Foreign Trade Addendum requirement for split accounting in 1947 was contrary to the calendar year provisions of section 709(a) and is therefore invalid. Accordingly, the profits and losses sustained from all voyages completed during the calendar year 1947 may be offset against each other in determining the obligation for additional charter hire; and

(d) That the judgment of the court below in favor of the Government for $64,000 should be reversed and the case remanded, with instructions to enter judgment in favor of petitioners for the amount of additional charter hire unlawfully exacted by Maritime.

Respectfully submitted,

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December 12, 1963

Office-Supreme Court, U.S.
FILED
DEC 13 1963
JOHN F. DAVIS, CLERK

No. 137

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, *Petitioners*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITIONERS' APPENDICES A AND B

December 12, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Appendix A

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APPENDIX A

Opinion of Judge Weigel in American President Lines, Ltd. v. United States

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

In Admiralty No. 28426

AMERICAN PRESIDENT LINES, LTD., a corporation, *Libelant*,

v.

UNITED STATES OF AMERICA, *Respondent*.

In Admiralty No. 28705

UNITED STATES OF AMERICA, *Libelant*,

v.

AMERICAN PRESIDENT LINES, LTD., et al., *Respondents*.

MEMORANDUM FOR JUDGMENT

[October 10, 1963]

These cases involve a bareboat charter under which American President Lines, Ltd. (hereafter "APL") commercially operated numerous Government owned cargo vessels during the years 1946-1955. APL alleges that the charter provided for illegally excessive rates of hire based on erroneous interpretations of pertinent statutes by the United States Maritime Commission and its successor agency, the Maritime Administration (hereafter sometimes collectively referred to as "Maritime"). APL accordingly seeks a declaratory judgment of its nonliability to the Gov-

ernment's demand for some two million dollars. The Government, denying illegality, libels APL and its surety for the hire allegedly due.

APL moves for summary judgment, the parties having filed numerous affidavits and exhibits. There being no genuine issue of material fact, the cases are ripe for decision. The libels are within this Court's jurisdiction. *Sword Line, Inc.* v. *United States*, 351 U.S. 976 (1956); *Luckenbach Steamship Co.* v. *United States*, 312 F. 2d 545 (2d Cir., 1963).

The legal issues stem from the provisions of the charter referred to at the outset. It is one of the standard "Form No. 303-SHIPSALESDEMISE" charters used in leasing out Government vessels to private operators under the Merchant Ship Sales Act, 1946, 50 U.S.C. App. 1735-1747. Some history of this standard charter and of the litigation about it are set forth in *American Foreign Steamship Corp.* v. *United States*, 291 F. 2d 598 (2d Cir., 1961), certiorari denied 368 U.S. 895 (1961), and in *Massachusetts Trustees of Eastern Gas and Fuel Associates* v. *United States*, 312 F. 2d 214 (1st Cir., 1963).

For the purposes of this memorandum, other relevant matters will be set out or indicated in connection with the issues to which they relate. There are five issues to be considered. The first is major and central.

1. *The "sliding scale" or "progressive profit-sharing" issue.*

The Merchant Ship Sales Act, *supra*, empowered Maritime to reject or approve applications for charter of the type of vessels here involved. (Sec. 5(a), 50 U.S.C. App. 1738(a)). Ensuing statutory provisions regarding charter hire underlie the principal controversy between the parties here and the conflict of authority among the courts which have passed upon the same question in other cases. Those provisions are these:

MERCHANT SHIP SALES ACT OF 1946
[50 U.S.C. App. 1738]

Charter of War-Built Vessels to Citizens

SEC. 5. • • •

(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rates for similar vessels for similar use as determined by the Commission.

(c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section.

MERCHANT MARINE ACT, 1936
[46 U.S.C. 1199]

SEC. 709. (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

The charter before the court provides, as to rates, for (1) a monthly firm or fixed "basic charter hire" of at least 15 per centum per annum of the vessels' statutory sales prices, plus (2) a contingent annual "additional charter hire" of from 50 to 90 percent of the charterer's cumulative net voyage profit in excess of ten per centum per annum of the capital necessarily employed in the charter operations.

This court holds that the challenged sliding scale is contrary to the governing statutory provisions. In so holding, I have considered the conflicting decisions on the question, all of which will be later cited, as well as the able advocacy, written and oral, of counsel expert on the issues. I would not add to the welter of words on the subject were it not for my conviction that the question is not close and that exposition of the reasons underlying this conclusion may be useful in the ultimate resolution of the conflict in authority.

At the threshold, I am unable to find any critical or, indeed, significant inconsistency between Section 5(b) and Section 709(a). The meaning of the words in these sections is clear. They make sense as part of a statutory purpose and plan within the province of the Congress. The judicial function, broad though it be, does not properly include substitution of the views of a court for those of Congress on economic and business questions. Judicial restraint in areas such as these is the measure of judicial wisdom, if, indeed, in an ultimate sense, not of judicial authority.

Section 5(b) begins by authorizing the Commission to fix charter hire "at such rate as the Commission determines to be consistent with the policies of this Act . . .". This grant of authority is then limited in three respects.

The first limitation is that the rate of charter hire shall not be less than 15 per centum per annum of the statutory sales price, computed as of the date of charter, except upon

the affirmative vote of no less than four members of the Commission. This limitation, contained in the first sentence of 5(b), is not involved in this case because the charter here requires a hire of at least the 15 percent requisite to avoid application of the limitation.

The second limitation is to the effect that the rates of charter hire fixed by the Commission shall, if they "differ from the rate specified," not be less than the prevailing world market charter rates. This limitation, set out in the second sentence of 5(b), is not here involved because the rate provided in the charter does not so differ.

The third limitation stems from the statutory declaration of Section 5(c) requiring that the provisions of Section 709(a) "*shall* be applicable to charters made under" Section 5(b) (emphasis added). The charter here is undeniably one made under Section 5(b). No one has suggested that there is any other authority for it, and there is none. It is plain, therefore, that the provisions of 709(a) apply. Congress could hardly have used language more clearly so requiring.

It is perhaps worthy of note here that, while the first two limitations upon the authority granted the Commission are stated as exceptions, the limitation imposed by Section 5(c) is stated positively and affirmatively through employment of the command "shall". It would hardly seem appropriate to treat a positive command as having less force in specifying a qualification upon a grant of power than a statement or statements qualifying that grant in the form of exceptions.

What, then, is the limitation upon the authority of the Commission thus made applicable by explicit command? It is a declaration in 709(a) which spells out in detail those provisions which must be included in "*Every charter made by the Commission* pursuant to the provisions of this title . . ." (emphasis added). When examination is made of

the provisions which Congress had thus declared requisite to every charter made by the Commission, we find an unambiguous, carefully worded and easily understood statement that every charter shall provide that "the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum . . .". Congress was careful and exact in its designations in 709(a) as to what it meant by the terms used in the quoted phrase.

Summarizing, the mandate of Congress relevant to the charter now before the court is this:

> The provisions of Section 709(a) *shall* be applicable and, accordingly, the charter *shall* provide that the charterer shall pay over to the Commission, *as additional charter hire*, one-half of cumulative net voyage profit in excess of the 10 per centum per annum.

The words "as additional charter hire" obviously mean charter hire in addition to that provided for by the Commission in exercise of its authority under Section 5(b). To hold otherwise is judicial amendment striking those words out of the statute. To hold that the words "shall pay over to the Commission . . . one-half of . . . cumulative net voyage profit" means that the cumulative net voyage profit to be paid *shall not be less than* one-half thereof is judicial enactment into the statute of a concept and words which are not there. It cannot reasonably be contended that Congress did not know how to specify a minimum when it so intended. It did that very thing in this very statute by the requirements, in Section 5(b), that the charter rate "shall not be less than" 15 percent of statutory sales price except upon the affirmative vote of "not less than four members of the Commission" as well as by the requirement therein that the charter rate under certain circumstances "shall not be less than" the referenced prevailing world market rates.

Why should plain language be disregarded? Why should Congressional draftsmanship be demeaned or attacked? Why should escape be sought from the plain meaning of plain words predicated upon inconclusive assumptions as to the history or purpose of the legislation? In putting these questions, it is not suggested that APL, as the charter has worked out, has not profited. However, this result has stemmed, it seems to me, from the economic vagaries and imponderables in chartering. The annual operations under this charter under the same management fluctuated, during a period of some nine years, from a loss in one year of $387,916.47 to a profit of $5,451,001.88 in another. There is no evidence to indicate that Congress was any less aware of the feast and famine characteristics of the shipping business than the Commission.

Congress, by the provisions of Section 5(b), Section 5(c) and Section 709(a) here operative said to Maritime, in effect: "You may charter at 15 percent or more per annum of statutory sales price, but you must also include a provision for payment, as additional charter hire, of one-half of cumulative net voyage profit as such provision is spelled out in Section 709(a) of this statute."

If, as it has been urged and is true, a purpose of the statute was to encourage sale as against charter, the Commission was given ample scope so to encourage by its broad power to fix the annual charter hire at any rate it wished over 15 per centum of statutory sales price. A high, non-contingent rate of charter hire would surely be more effective in inducing sale than a contingent rate, however high, preconditioned upon the making of a profit in excess of 10 percent of invested capital.

Moreover, the requirement of equally dividing cumulative net voyage profit between the Commission and the charterer may well be advantageous to the government of the United States and serviceable to proper Congressional

purposes. There are interlocking relationships between revenue from charter hire on the one hand and, on the other, costs of shipping, including costs of shipping which must be borne by governmental agencies. While one purpose of the statute was to encourage sale over charter, there were other objectives calling for a balancing, such as, for example, encouragement of a thriving American Merchant Marine for the purposes of defense, full employment and the like. The provisions of 709(a) requiring, in effect, that charterers should receive 50 percent of certain profits make good sense in that interest. Furthermore, while the connection may not be direct and applicable in all cases, profit enjoyed by a domestic shipping company surely has some relation to its need for government largesse in terms of subsidies.

It may be that a Congressional enactment permitting the Commission to do what it has done in this charter would more effectively have promoted the policies of the Act. But that supposition, even if amounting to conviction, does not justify disregarding the mandate of Congress.

We have here, then, a statutory scheme which is clear. There is a grant of power to the Commission. It is not an unqualified grant. It is qualified by two exceptions (neither applicable here) and by an express requirement (very much applicable here). Nothing in the facts preclude application of the statute as written and enacted by the Congress of the United States. Congress may have been wiser in what it provided, although that is subject to reasonable debate. In any case, we are not concerned with the wisdom of what Congress did. There is no contention here, nor could there be any reasonable one, that Congress acted beyond its authority.

In short, in the absence of reasons far more compelling than any here present, it seems unwise, indeed, to hold that Congress meant something different than it plainly said.

The holding here, it should be underscored, is not that the Commission proceeded under the wrong section or sections of the statute or that it could have exacted the charter hire it undertook to require here by the use of different language in its forms. The holding here is that Maritime was bound by a clear requirement imposed by Congress in its proper exercise of legislative power. And, of course, the holding here is not that the Commission acted in any way in bad faith nor with any intent other than to acquit its responsibilities in the highest public interest.

As noted earlier, other courts have reached a different conclusion or have reasoned differently in arriving at the same result. I am most grateful to the learned authors of the opinions in those decisions because study and re-study of their views generated whatever merit there may be in those outlined above. The cases are: *American Export Lines, Inc.* v. *United States*, 290 F.2d 925 (Ct. Cl., 1961); *American Mail Line, Ltd.* v. *United States*, 213 F.Supp. 152 (W.D. Wash., 1962); *Dichman, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (S.D.N.Y., 1956); *Massachusetts Trustees of Eastern Gas and Fuel Associates* v. *United States, supra*, affirming the decision reported in 202 F.Supp. 297 (D. Mass., 1962); and *United States* v. *Eastport Steamship Corporation*, 216 F.Supp. 649 (S.D. N.Y., 1963). See, also: *United States* v. *East Harbor Trading Corp.*, 190 F.Supp. 245 (S.D.N.Y., 1960) and *Sword Line* v. *United States*, 228 F.2d 344 (2d Cir., 1955), aff'd on rehearing 230 F.2d 75, aff'd as to jurisdiction 351 U.S. 976 (1956).

2. *The estoppel and "January 30, 1959, letter agreement" issue.*

APL is not estopped from limiting its liability for cumulative net voyage profits to the one-half specified by 709(a). In the first place, I construe the final proviso of Clause 13 of the charter here to constitute a reservation of rights by

the charterer which effectively forecloses any claim of estoppel. The text of the clause as well as a thoroughgoing review of its history and significance are set out in Judge Friendly's dissent in *American-Foreign, supra*, 291 F.2d 598 commencing at page 613. Judge Friendly's interpretation there appears to me to be unassailable as does that of Judge Beeks in construing the same clause in *American Mail Line, supra.*

While it seems clear to me, without more, that there is no estoppel against APL, the latter's letter of January 30, 1959 to the Commission (made an agreement by the Commission's written acceptance) has cumulative relevance here as well as to APL's request for a protective order regarding certain charter hire payments keyed to the time of the making of subsidy payments to APL.

In January 1959, there was approximately $8,000,000 of accrued subsidy due from Maritime to APL, and about $7,700,000 of charter hire due Maritime, on various charters, a portion of which was in dispute. In order to provide for an orderly liquidation of these accounts, and because of the existing dispute, the parties executed a letter-agreement on January 30, 1959, which provided that when a subsidy payment was made to APL, the latter would make a payment to Maritime of equal amount to be applied first in liquidation of undisputed charter hire, and then to hire which was in dispute. To avoid the arguments advanced in *American-Foreign Steamship Corp., supra*, that such disputed payments would be voluntary and unrecoverable, the agreement said in part:

> 4. . . . It is agreed that such payments shall be without prejudice to or effect upon the rights and claims of either party, and that such payments shall not be considered to be a voluntary payment in acceptance of the position of the United States with respect to any such unresolved or disputed item.

Since payments of disputed hire may shortly be made on the charter here in litigation, APL asks that the agreement be declared valid. The Government contends that it is without consideration and therefore ineffective.

The agreement was admittedly executed by an authorized official of the Administration, and APL undertook thereby to make payments of hire which it might otherwise withhold because of the existence of a bona fide dispute. It was therefore supported by consideration and valid. See: 17 C.J.S., *Contracts* § 110; *Richfield Oil Corp.* v. *United States*, 248 F.2d 217, 223 (9th Cir., 1957); *Pittsburgh Testing Lab.* v. *Farnsworth & Chambers Co.*, 251 F.2d 77, 79 (10th Cir., 1958); *Board of Education* v. *American Nat. Bank*, 294 Fed. 14, 19 (8th Cir., 1923); *United States* v. *Westmoreland Manganese Corp.*, 134 F.Supp. 898, 910 (E.D. Ark., 1955), aff'd, 246 F.2d 351 (8th Cir., 1957); *Maco Warehouse Company California* v. *United States*, 169 F.Supp. 494, 500 (Ct. Cl., 1959); *In re New York, O. & W. R. Co.*, 178 F.2d 765, 766 (2d Cir., 1950).

3. *The "split accounting" or "Foreign Trade Addendum" issue.*

APL states that Section 709(a) calls for additional charter hire to be computed on an *annual* basis. It alleges that Maritime violated that command by requiring an agreement calling for additional charter hire from voyages after September 1, 1947, to be computed separately from that of voyages prior to that date.

The facts compel rejection of APL's argument. The real issue here is not as to the period or periods for computation of additional charter hire. It is as to the term of charters.

Maritime notified all charterers on August 15, 1947, that it was exercising the right (reserved in the charters to both parties) to terminate chartering on 15-days' notice. Some charterers requested Maritime to devise new terms and conditions for acceptance in lieu of termination. On

August 20, 1947, Maritime announced such new terms (including a requirement for separate accounting after September 1, 1947), but stated that the original termination notice would stand, absent acceptance of the new agreement.

APL voluntarily sought and obtained such a new agreement ("Foreign Trade Addendum"). The new agreement expressly stated it was "a *separate* charter between the parties." There is no evidence that APL's acceptance of the new agreement was unlawfully forced. Nor were Section 709(a)'s calendar year accounting requirements violated; they do not provide that two *separate* charters within one year must be combined for accounting purposes. See *Massachusetts, supra*, at 223.

4. *"Cumulative accounting" issue.*

This issue calls for determination of the proper accounting period or periods for cumulation of profits and losses in establishing liability for additional charter hire which may be payable under Section 709(a). Resolution requires construction of the following language of that Section (the entire Section is set out, *supra*, at page 3):

> Every charter * * * shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits * * * shall exceed 10 per centum per annum on the charterer's capital necessarily employed * * *, the charterer shall pay over to [Maritime], as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum; *Provided*, That the cumulative net voyage profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

The positions of the parties, as set out in greater detail below, are these: Maritime has long interpreted this Section as calling for payment whenever, at the end of any calendar year of the charter, excess profits have cumulated from the starting date of the charter or, as the case may be,

from the start of the calendar year following the last payment of additional charter hire. APL contends that any payments made on this basis are tentative, and that final liability for additional charter hire is to be determined at the end of the charter after cumulation of profits and losses over the life of the entire charter period.

This court has concluded that Maritime's interpretation, now to be more fully spelled out, is correct. Taking the commencement of the term of the charter as the starting date of the period of computation, no additional charter hire is payable until the end of an ensuing calendar year (whether the first following the starting date or a later one) when, cumulating profits and losses for the entire intervening period, the accounting shows that the requisite excess profits have accrued. A profit payment is then to be made to Maritime and such payment is considered final. If, during the term of the charter, a profit has thus become payable, a new and separate period of cumulation commences with the beginning of the calendar year following the period for which payment has been made and extends to the end of a following calendar year when cumulation for the entire intervening period (again whether for a year or more) shows a profit to be payable. Thus as to any given charter, *depending on the operating figures*, there are three possibilities: (1) Additional charter hire may be payable following the end of each calendar year of the term of the charter or (2) no additional charter hire may ever accrue or (3) there may be one or more periods during the term of the charter when additional charter hire becomes payable.

The accounting periods for cumulation and computation of additional charter hire are determined by the operating figures. The end of each calendar year marks the date for casting up the figures to determine whether or not additional charter hire has become payable; but no pay-

ment becomes due unless the cumulation of figures for a year or longer shows the requisite excess of profits over losses.* When, however, such a payment is determined to be due, the effect of the proviso of the Section is to close that period of cumulation; a new period is then started for purposes of computation; and so on to the end of the charter period.

APL urges that Section 709(a) is to be read as requiring cumulation of profits and losses over the *entire* period of the charter. In the recent case of *United States* v. *Moore McCormack Lines, Inc.*, 308 F.2d 866 (4th Cir., 1962; cert. den. 372 U.S. 944, 1963) reversing the District Court holding reported in 199 F.Supp. 522 (D. Md., 1961), the Court of Appeals gave such a meaning to the Section. It held that the profit payments made under the Maritime formula were to be considered merely tentative and were subject to readjustment at the end of the charter after a final audit of the operating figures for the entire term of the charter. The court there reasoned, and APL here contends, that the purpose of the proviso was not to prevent profits from being carried forward against subsequent losses, but was only to protect the charterer against paying more than once on the same profits. It seems to this court, however, that the proviso proscribes the carry-forward for any purpose of profits once accounted for, i.e., whether to add to subsequent profits or to offset subsequent losses. Nowhere in the Section is there language which suggests that payments of additional charter hire are not final. Had Congress wished to indicate otherwise, it easily could have done so.

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* Of course, it is possible, consistently with the foregoing, that the first or last payment of additional charter hire may be due for a period of less than a full year. For example, if the commencement date of the charter were June 1 and the operating figures for the ensuing six months to the end of that calendar year should show a profit payable on the basis set out in 709(a), the amount of that profit would be payable as to that six months.

5. *The "quantum valebant" issue.*

The Government argues that if the charter is held illegal the parties would be relegated to a *quantum valebat* or *quantum valebant* situation and that under the doctrine of unjust enrichment APL would then be obligated to pay the fair market value of the vessels' use. See *Massachusetts, supra*, 202 F.Supp. at 308; *Clark* v. *United States*, 95 U.S. 539 (1877). But the holding here is not that the charter is illegal. The holding here is that only that portion of it which exceeded Maritime's authority is not to be enforced and that the parties, in effect, agreed that this would not invalidate the rest of the charter. To invoke *quantum valebat* here would be needlessly to cast adrift upon uncharted seas this charter, the parties to it and, prospectively, governmental agencies bound by Congressional limitation of rate-making power.

Counsel have indicated that the amounts to be awarded by judgment can be stipulated. They are granted thirty days in which to so do and in which to submit a proposed judgment accordingly implementing this opinion. Such judgment shall also effectively provide that payments of disputed charter hire made by American President Lines, Ltd., pursuant to the January 30, 1959 letter-agreement are without prejudice to the rights of either party and are not to be considered voluntary payments so as to bar recovery thereof.

Dated: October 10, 1963.

STANLEY A. WEIGEL
Judge

APPENDIX B

LEGISLATIVE HISTORY APPENDIX

Part I—Legislative Background Showing Mandatory Character of Section 709(a) as Embodied in the Merchant Marine Act, 1936

The legislative history of the 1936 Act shows that Congress meant to fix the profit sharing percentage at 50 percent for all charters under that act. It did not mean to authorize the Maritime Commission to vary the figure upward (or downward). The purpose of Congress in providing for profit sharing was to allow charterers a "fair profit, but not an excessive profit." The proposed legislation that became the act first used that very language as a rate making standard. In the legislative evolution, the specific 50 percent rate replaced this dual but general standard. At the same time a provision requiring variation in the profit sharing percentage (actually a sliding scale in another form) was rejected. By specifying a rate, in lieu of a general rate making standard and of a sliding scale, Congress manifested its intent to withhold from the agency the discretion (now claimed by the Government) to set the profit sharing rate administratively.

The chartering provisions were incorporated into the 1936 Act on the Senate floor as a compromise between supporters of the Copeland bill (S. 3500, 74th Cong., 2d Sess. Calendar No. 1799, Feb. 24 (calendar day Mar. 26) 1936) and supporters of the Guffey bill (S. 4110, 74th Cong., 2d Sess. Feb. 24 (calendar day Feb. 27) 1936). The Copeland bill, reported to the Senate by a majority of the Committee on Commerce (S. Rep. No. 1721, 74th Cong., 2d Sess. (1936)), contained no chartering power. The Guffey bill, supported by a strong minority, contained extensive chartering authority in "Title VII—Operating

Charters." Most of those provisions were identical with the chartering provisions that became title VII of the act.[1]

The principal area of difference between the chartering provisions in the original Guffey bill and those in the compromise revision of that bill which was enacted lay in the method of fixing rates of charter hire. Both the Guffey bill and the final act contained competitive bidding requirements.[2] The Guffey bill, however, provided (with elaborate qualifications) that the charter be awarded "to the bidder proposing to pay the highest percentage of voyage profits as charter hire" (§ 46(a)). It further provided for an ascending scale of "additional charter hire" in the event of an increase in revenue accruing to the charterer from freight rate increases (§§ 47(a) and (b)).[3] Finally, the bill (§ 44) laid down guidelines for the Commission to follow in determining what was a reasonable charter hire. One of these was that the Commission was to "encourage the realization *of a fair profit, but not an excessive profit*, by the private operator" (§ 44(e)). This provision was to apply during periods of prosperity; in times of shipping depression, the Commission was au-

[1] Sections 39-43, 45(a), 46(b) and (c), 47(c) and 48-51 of the Guffey bill were practically identical with sections 701-705, 706(a), 707(b) and (c), 709(b) and 710-13 of the act.

[2] Section 45(a) of S. 4110; sections 706 and 707 of the act (49 Stat. 2009, as amended, 46 U.S.C. §§ 1196-97).

[3] Section 47(b) of the Guffey bill (S. 4110) provided:

> Such additional charter-hire provision shall be identical in every charter and *shall provide for a progressively higher percentage share in voyage profits to be paid to the Commission* for every increase of 10 per centum in the freight or passenger rates in the trade territory served by the line when such increase results in increased revenue to the charterer, but the formula shall be so devised that due credit shall be given to the charterer for any increase in voyage expense occasioned by the economic conditions which have brought about the increase in freight and/or passenger rates.

thorized to charter vessels without payment of any charter hire.[4]

The Senate committee rejected the Guffey bill partly on the basis of objections to the provisions authorizing charters without payment of hire in times of depression and for charter hire based partly on profits in good times. These were thought not to provide sufficiently for recoupment of the Government's investment in ships (S. Rept. No. 1721, 74th Cong., 2d Sess. p. 12 (1936)). To meet the stated objections, the compromise bill replaced the provision for award to the bidder offering the highest rate of profit sharing with the present section 707(a), which dictated the award "to the bidder proposing to pay the highest monthly charter hire," and with sections 706(b) and 714, which fixed a minimum dollar rate (based on percentage of selling price and calculated to cover the Government's investment) below which the Commission could not go. The ascending scale of profit sharing in section 47(b) was replaced by the present section 709(a) fixing a flat 50 percent rate. And that provision served the further purpose of giving specificity to the more general exhortation of the Guffey bill that in times of prosperity the Commission should "encourage the realization of a fair profit, but not an excessive profit."

Thus the flat 50 percent replaced a rejected ascending scale; it also replaced a general statement of Congress's

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[4] Indeed, in bad times the Commission was authorized to accept bids requiring it to pay some of the charterer's expenses. Thus, section 44(a) provided:

> During period of economic depression which makes it difficult to operate profitably any line, the Commission is authorized to require only a nominal charter hire, and on any lines that cannot be operated except at a loss the Commission is authorized to require no charter hire and further assist the operator by paying a certain proportion or all of the wages of the crew. . . .

ultimate rate objective—a profit sharing rate "fair" . . . but not . . . excessive." To the extent that the opponents of the Guffey bill feared excessive profits, the 50 percent was a floor under contractual profit sharing. But to the extent that its supporters sought to assure the charterers "fair" profits, the 50 perecnt was a ceiling. Both purposes of Congress cannot be attained unless it is treated as both floor and ceiling. Moreover, to permit the Commission to vary the rate would nullify two deliberate actions of Congress, one removing the subject of profit sharing from the area of general exhortation to that of specific definition, and the other, removing it from the variable to the fixed.

The court below criticized this argument from the legislative history on the ground that the Senate rejected the Guffey bill as a "giveaway."[5] But it is not clear what follows from this. The "giveaway" objection did not run to every chartering provision in the Guffey bill—clearly it had no application, for example, to the proposed ascending scale of profit sharing.[6] In any event the final version was a compromise between the supporters and the opponents of the Guffey bill, and in the evolution of that

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[5] The court below did not find any indication in the legislative history that section 709(a) fixed only a floor, not a ceiling; it merely rejected the contrary argument, and on somewhat obscure grounds. In fact, the fundamental reason for rejection of the Guffey bill by the majority of the Senate Committee was their objection to its provisions for Government construction, ownership and operation of vessels. The term "giveaway," which the court of appeals coined, and upon which it relied in rejecting petitioner's argument, more accurately describes the views of the ten member minority of the Senate Committee in criticizing the Copeland bill (S. Rept. No. 1721, 74th Cong., 2d Sess., pp. 25-26 (1936)).

[6] True, the committee majority regarded the Guffey bill as inadequate protection for the Government; but its objections went chiefly to the provisions for charters free of hire in bad times; not to the provision for profit sharing in good times. Under the Guffey bill, as under the act, the Government was to share profits in good times—indeed, to share them on an ascending scale.

compromise certain facts are fundamental. First, the act substituted a dollar minimum rate for bidding based on percentage of profits; second, the act, substituted the 50 percent rate of additional charter hire for an ascending scale of additional charter hire; and third, it substituted the 50 percent rate for the general concept of a "fair profit, but not an excessive profit." The conclusion is inescapable that the 50 percent rate was meant to be the one and only profit sharing rate.

Further evidence of the intent of Congress in enacting section 709(a) will be found in considering the so-called subsidy recapture provisions of section 606(5) of the 1936 Act.[7] These provisions are so similar in language to sec-

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[7] SEC. 606. Every contract for an operating differential subsidy . . . shall provide

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(5) that when at the end of any ten-year period during which an operating-differential subsidy has been paid under a contract or consecutive contracts (such period to be computed from the end of the operator's last completed recapture period regardless of its duration, or from the beginning of subsidized operations if the operator has not previously completed a recapture period), or when prior to the end of such ten-year period subsidized operations shall be finally terminated, if the net profit of the contractor on his subsidized vessel and services incident thereto during such period or time (without regard to capital gains and capital losses), after deduction of depreciation charges based upon a life expectancy of the subsidized vessels determined as provided in section 607(b), has averaged more than 10 per centum per annum upon the contractor's capital investment necessarily employed in the operation of the subsidized vessels, services, routes, and lines, the contractor shall pay to the United States *an amount equal to one-half of such profits in excess of 10 per centum per annum* as partial or complete reimbursement for operating-differential subsidy payments received by the contractor for such recapture period, but the amount of excessive profit so recaptured shall not in any case exceed the amount of the operating-differential subsidy payments theretofore made to the contractor for such period under such contract or consecutive contracts and the prepayment of such reimbursement to the Commission shall be subject to the provisions of section 607; . . .

tion 709(a) that the same legislative intent can fairly be attributed to both. Since there can be no doubt that recapture under section 606(5) is restricted to 50 percent, no more and no less, the same percentage used in section 709(a) is likewise both a maximum and a minimum.

That the 50 percent recapture clause in section 606(5) is both a floor and a ceiling is evident from statements made by the managers of the bill in both the House and Senate debates. Senator Guffey stated (80 Cong. Rec. 6779 (1936)):

> All profits earned by a steamship company in excess of 10% per annum would be shared with the Government on a 50-50 basis.

Congressman Sirovich stated (80 Cong. Rec. 10575 (1936)):

> Fourth, the bill further provides for the recapture of profits in excess of 10%. One-half would go to the Government and one-half to the reserve fund so as to enable shipping operators to rebuild their ships when they became old and obsolete.

Furthermore, as first proposed, S. 3500, the Copeland bill, containing the provisions that eventually became section 606(5), established the recapture rate at 75 percent of profits in excess of a 6 percent return to the steamship company (§ 530(c), S. 3500, 74th Cong., 2d Sess. (introduced Jan. 6, 1936)). The modification of these rates to 50 and 10 percent, respectively, evidences an intent to restrict the Government's share. Also, the committee report stated (S. Rept. No. 1721, 74th Cong., 2d Sess. p. 20 (1936)):

> Provision is made for the recapture by the Government to the extent of the operating subsidy of 50 percent of the profits above 10 percent, after the creation of the required reserves.
>
> Your committee thought it wise to insert this provision although the possibility of recapture to some

> extent destroys the 'parity' or equality of opportunity with the foreign competitor, no doubt contemplated by the President in his message of March 1935. No foreign subsidizing nation, other than France, applies this theory, but France shares losses as well, a proposition vastly more desirable to the ship owner than our proposal, which contains no guarantee whatever against losses.

These comments show that the committee had doubts as to the wisdom of requiring any recapture of profits whatever, since this would conflict with a basic policy of the act—parity of the ship operators with their foreign competitors.[8] The committee made an accommodation between the parity policy, on the one hand, and the secondary policy of limiting profits, on the other, by settling upon an even split of all profits above 10 percent. On a construction which treats 50 percent as a floor but not a ceiling, effect is not given to both branches of this accommodation, and the primary objective of the subsidy program is the branch that falls.[9]

Additional policy considerations made Congress further aware of the necessity that 50 percent be construed as a ceiling on recapture. Upon the recommendation of the Maritime Commission, section 606(5) was amended in 1938 to increase to ten years the period during which

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[8] The basic theory of titles V and VI of the 1936 Act (46 U.S.C. §§ 1151-1182) was and is to pay subsidy to the shipbuilders and operators in an amount equal to the difference between domestic and foreign costs of construction and operation.

[9] The views of the ten members of the committee minority are consistent with the equal-sharing intent evidenced by the majority. They recognized that the operator "... must share one-half of any remaining profits [above 10 per cent] with the Government" (S. Rept. No. 1721, 74th Cong., 2d Sess., p. 26 (1936)). The minority criticized recapture not because of the fifty-fifty formula, but because of the provisions of title VI for reserve funds to be set up by the operator out of profits before recapture.

profits and losses would be accumulated and offset against each other for purposes of calculating recapture. The purpose of the amendment was stated by the House Committee as follows (H. Rept. No. 1950, 75th Cong., 3d Sess. p. 23 (1938)):

> This amendment is one which the Commission reported as being most necessary in order to attract private capital to the maritime industry. . . . Experience has shown that 5-year periods do not cover the average business cycle in the steamship business. The result will be that profits earned in the prosperous period of the business cycle would be recaptured with no reserves left for the depression period. On the other hand, a 10-year period will come very close to covering the whole cycle. It is proposed to change the 5-year period to one of 10 years. This change will distinctly tend to attract investment in the industry and is most essential to obtain the development of the merchant marine sought for by the act.

All these considerations together demonstrate Congressional awareness of the necessity, and its intention, that vessel operators be assured a reasonable share of their profits during good times. To construe the recapture provision as fixing a floor but not a ceiling would conflict with this desire and with the fundamental objective of the 1936 Act, the development of a vigorous, privately operated American merchant marine. What was sought to be accomplished by the recapture provisions was, in their own field, also sought to be accomplished by the chartering provisions, which therefore, require a like construction.

The Maritime Commission anticipated the error that it fell into later with respect to chartering. Its 1937 report to Congress[10] pointed out:

> The moment a subsidized ship line creates substantial cash reserves and perhaps, begins to pay dividends,

[10] United States Maritime Commission, *Economic Survey of the American Merchant Marine*, 36 (1937).

there arises a demand for a reduction in the amount of aid. The general public does not know that the cyclical nature of the shipping industry requires large cash reserves; nor do people stop to realize that the continuation of private investment requires the payment of profits. The investor cannot be blamed for hesitating to put his money into an industry which, if profitable, is constantly subject to public and congressional condemnation on the ground of excessive subsidy.

Its later attempt to construe away the ceiling aspect of section 709(a) shows how valid that prophecy was.

PART II—LEGISLATIVE COMMENT ON DESIRABILITY OF CHARTERING UNDER THE MERCHANT SHIP SALES ACT OF 1946.

In the House debates it was stated:

> MR. HALE. The bill also provided in section 5 for the charter of war-built ships to citizens at a statutory charter hire. There is no provision for chartering to foreigners. Obviously we desire to sell ships rather than to charter them, but the committee did not feel that we should refuse to charter. In a time of such great economic unrest we recognize that many domestic shipping interests will prefer to charter and await developments rather than to buy. (91 Cong. Rec. 9196 (1945))

Further reference is made to the subject in H. Rep. No. 831, 79th Cong., 1st Sess. pp. 8-9 (1945), where it was stated:

> While it is the policy of the bill to place as many of the war-built vessels as possible in the hands of private operators, it is recognized that there will be many cases where, because of uncertainty of success in reestablishing a trade, or because of opening up a new trade, sales will not be possible, whereas charters will. If the operator meets with success under a charter, he will in all likelihood desire to purchase the chartered vessel or another war-built vessel. Until

that time, he will have had an opportunity, without a large capital outlay on his part, of establishing or reestablishing a trade, and the United States in return will have received a charter hire sufficient in amount to cover depreciation on the vessel during the charter period, the interest it would have received if the vessel had been sold, and 6½ percent per annum in addition as compensation for the use of the vessel.

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Certain provisions applicable to charters under the Merchant Marine Act, 1936, are also made applicable to charters under the bill. The vessel is made eligible for an operating differential subsidy (sec. 708 of the 1936 act); one-half of the profits in excess of 10 percent of the capital necessarily employed in connection with the chartered vessel must be paid to the Commission as additional charter hire (sec. 709 of the 1936 act); . . .

During consideration of the draft of the legislation which contained a 12½ percent basic rate, Maritime commented to the House Committee with respect to the rate of charter hire and its effect on encouraging sales over charters, as follows:

The rates of hire set forth in the bill have been subjected to some criticism on the theory that they are too high while other criticism is directed against chartering at all. The theory of the bill is that, while charter terms should not be such as to encourage the charter of vessels rather than their sale, nevertheless there may be a substantial number of operators who may ultimately become purchasers but who hesitate to do so because of uncertain trade conditions, particularly in the development of new routes. There will also exist situations where the right types of vessel for the long-range development of the trade are not immediately available and the chartering of existing vessels may constitute a worth-while temporary solution pending more suitable replacement vessels. This is particularly true in the passenger trades and it may well be that even the minimum rates set forth in the bill may be too high to permit successful opera-

tion. The bill accordingly permits giving effect to such special circumstances by the Commission upon concurrence of four members. (Hearings before the House Committee on Merchant Marine and Fisheries on H. R. 1425, 79th Cong., 1st Sess. p. 493 (1945))

S. Rep. No. 807, 79th Cong., 1st Sess. pp. 13-14 (1945), commented upon the charter hire provision, as follows:

> The Commission will fix the charter hire consistently with the policies of the act, but the rate of hire, unless the Commission by vote of four members otherwise authorizes, may not be less than 15 percent per annum of the statutory sales price. . . .
>
> The rate of 15 percent, it is contemplated, will provide a charter hire sufficient in amount to cover depreciation during the charter period, interest at the rate the United States would receive from unpaid installments if it had been sold, and 6½ percent in addition as compensation for the use of the vessel. This rate of 15 percent conforms with the wartime practice of fixing bareboat use under War Shipping Administration operation at 15 percent of value for vessels built since 1937—a standard generally regarded as reasonable for the past. Under the 1936 act subsidy provisions 5 per centum is the depreciation rate, and 10 percent profit is allowed before recapture operates. It is recognized that the value of the use may decline in the future because of the existence of tonnage in excess of world shipping requirements. The Commission is given discretion by a vote of four to prescribe a lower rate, subject to the limitation as to world charter rates. This limitation will have to be realistically applied taking into account various factors such as the trade routes involved, rates charged by or in other countries, and the temporary or short-time charter of world rates at a given time. . . .
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> Certain provisions of the Merchant Marine Act, 1936, relating to charters, are made applicable to charters under section 5. The vessel is made eligible for an operating differential subsidy (sec. 708 of the

1936 act); one-half of the profits in excess of 10 percent of the capital necessarily employed in connection with the chartered vessel must be paid to the Commission as additional charter hire (sec. 709); . . .

In postenactment hearings before the House Committee on Merchant Marine and Fisheries on H.R. Res. No. 36, 80th Cong., 2d Sess. p. 4 (Feb. 12, 1948), the Chairman of Maritime testified:

> Experience under the charter program indicates that it affords opportunity for United States operators to expand their ship operations and to enter into the field of tramp operation, acquiring the operating knowledge in that field and the desirable knowledge of sources of tramp cargo which may help to build a permanent business, and justify acquisition of tonnage for use in permanent business.

PART III—MANDATORY CHARACTER OF SUBSIDY, SALES AND CHARTER PROVISIONS IN THE 1936 AND 1946 ACTS.

In the 1936 Act, are the following mandatory sections: Section 505(b) ("No contract shall be made for the construction of any vessel under this Act unless the shipbuilder shall agree . . ."); section 506 ("Every owner of a vessel for which a construction-differential subsidy has been paid shall agree . . ."); section 603(b) ("Such contract shall provide that . . ."); section 606 ("Every contract for an operating differential subsidy under this title shall provide . . ."); section 607(a) ("Every contract for an operating-differential subsidy made under authority of this title shall provide . . ."); section 709(b) ("Every charter shall contain a definition of the terms . . ."); section 712 ("Every charter shall provide . . ."); section 801 ("Every contract executed by the Commission under the provision of titles VI or VII of this Act shall contain provisions requiring . . ."); section 802 ("Every contract executed by the Commission under authority of title V of this Act shall provide . . .").

In the 1946 Act there are many specific mandatory sections, such as section 8(d) (50 U.S.C. App. 1736(d)), laying down a mathematical formula for the determination of sales prices for vessels and the adjustment of these prices for "desirable features" and depreciation; section 4(a) (50 U.S.C. App. 1737(a)), which provides that Maritime "*shall sell*" vessels to qualified citizen applicants, "*at the statutory sales price*"; section 4(b) (50 U.S.C. App. 1737(b)), laying down the specific terms of mortgage sales; section 4(c) (50 U.S.C. App. 1737(c)), specifying that neither contracts of sale nor mortgages "shall . . . restrict the lawful or proper use or operation of the vessel"; section 5(b) (50 U.S.C. App. 1738(b)), setting the basic charter hire rate at "not less than 15 per centum," or if less than this rate, "not less than the prevailing world market charter rate"; section 5(c) (50 U.S.C. App. 1738(c)), stating that the provisions of section 709 "*shall* be applicable to charters . . ."; and section 9 (50 U.S.C. App. 1742), fixing a strict mathematical formula for the adjustment in the price of vessels purchased by citizens prior to enactment of the Act. In dealing with sales of vessels to noncitizens, section 6(a) of the 1946 Act (50 U.S.C. App. 1739(a)) authorizes Maritime to charge a price of "*not less than* the statutory sales price." That same section also provides that no sales shall be made to noncitizens until vessels had been made available for a reasonable time for sale or charter to citizens of the United States.

The Merchant Ship Sales Act was under active consideration in Congress from 1944 until its enactment in 1946. The documentation is voluminous. The excerpts given below demonstrate that the Congress deliberately set out to prescribe precise, detailed and mandatory standards for the calculation of the sales prices and charter hire rates for the Government's surplus ships. Every effort was made to minimize the area of administrative discretion.

In anticipation of post-war problems of merchant marine policy, the Navy Department and the Maritime Commission contracted with the Graduate School of Business Administration of Harvard University for a study and recommendations. The report thus prepared was before the Congress throughout its deliberations, was printed as a Committee document in the House,[1] was drawn upon in the preparation of committee reports, was referred to frequently in floor debate, and can well be considered the starting point for the development of Congressional policy on the post-war disposition of the Government's warbuilt fleet.

The Harvard Report made a detailed analysis of our experience after World War I in meeting problems expected to be encountered again, and made the following comments on our historical experience:

> A third factor was the lack of a clearly defined and approved public policy. . . . These conflicting opinions led to congressional debate, widespread editorial comment, confusion and timidity in private enterprise, and criticism of any significant sales actions taken by the Board. . . .
>
> . . . No specific instructions were included in the act concerning the terms of vessel disposal, however, and no measures were proposed to aid potential purchasers.
>
> Thus a fourth factor, closely associated with the third, hindering the sale of vessels, was the lack of definite legislative provisions to guide the Shipping Board in the sale of vessels. (At page 230.)[2]

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[1] *The Use and Disposition of Ships and Shipyards at the End of World War II*, H.R. Doc. No. 48, 79th Cong., 1st Sess. (1945).

[2] Senator Bailey, Chairman of the Committee on Commerce, quoted at length from the Harvard Report in his opening statement at the final Senate hearing on the statute. The language given above was selected for emphasis by Senator Bailey, and is italicized in the printed transcript. Hearings before a Subcommittee of the Committee on Commerce on S. 292, 79th Cong., 1st Sess., at 55-86 (1945).

Both Houses of the Congress paid heed to this warning of our past mistakes and deliberately wrote into the World War II Ship Sales Act mandatory provisions prescribing in detail the terms and conditions of sale and charter of war-built vessels.

The Senate Committee report on the bill said:

> Your committee is of the opinion that the history of the merchant marine and the testimony at the hearings fully support conclusions summarized in the Report on the Use and Disposition of Ships and Shipyards at the End of World War II (Graduate School of Business Administration, Harvard University), which analyzes the postwar ship sales history of World War I. That report emphasizes the lack of a clearly defined and approved public policy with respect to the disposition of the war-built fleet. It emphasizes the lack of definite legislative provisions to guide the Shipping Board in the sale of vessels. (See Doc. No. 48, House Merchant Marine and Fisheries Committee, p. 230.) . . .
>
> . . . *Only Congress can lay down the necessary standards and directions for the orderly disposition of the war-built fleet*, in order that there may be established and maintained a healthy and vigorous postwar American merchant marine in the interest of world-wide peaceful commerce, in the interest of national security, and *in order that those having the direct responsibility of administration may be guided and controlled by standards acceptable to the Congress* speaking in the public interest. (Emphasis supplied.) (S. Rep. No. 907, 79th Cong., 1st Sess. 2 (1945)).[3]

The Maritime Commission was not only to be *guided* by Congressional standards; it was to be *controlled* by them.

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[3] A similar statement was made by the House committee in its report, H. Rep. No. 831, 79th Cong., 1st Sess. 2-3 (1945).

The Conference Report on the bill is filled with numerous determinations compromising disagreements in precise arithmetical terms or in precise definitions classifying vessels and prospective purchasers or charterers and spelling out allowances and adjustments. H. Rep. No. 1526, 79th Cong., 2d Sess. (1946).

In a statement opening the final Senate hearing on the bill, Senator Bailey, Chairman of the Committee on Commerce, quoted extensively from the Harvard Report, and said:

> The problem of orderly disposition of that fleet is of such national and international import that the Congress must speak affirmatively and positively in laying down standards and directions for its disposal, in order that there may be established and maintained a healthy and vigorous postwar American merchant marine, in the interests of world-wide peaceful commerce, in the interests of national security, taking advantages of lessons learned in World War I and the period intervening before World War II, and in order that those having direct responsibility may be guided by standards acceptable to the Congress. (Hearings before a Subcommittee of the Committee on Commerce on S. 292, 79th Cong., 1st Sess., at 84 (Sept. 14, 1945)).

During Senate debate, Senator White, a member of the Committee, vigorously attacked the bill on the ground that it left no discretion in the Maritime Commission as to the terms upon which vessels could be sold or chartered. The following colloquy took place on the Senate floor:

> Mr. White . . . Then, in my view, this bill undertakes so to circumscribe the authority, so to limit the activities, and so to subordinate the judgment of the Maritime Commission with respect to what ships should be sold and the prices at which they should be sold that the purpose of the bill is defeated.
>
> Mr. President, at other times we have faced situations in which it was necessary to move in sale or

charter ships of the United States not needed for the commerce of the United States. In the 1916 Shipping Act there was a provision for the disposition of our ships; but that act contained no such limitations upon the authority and discretion of the Shipping Board as are to be found written into this bill with respect to the authority and discretion of the Maritime Commission. In 1920 we again wrote legislation with respect to our shipping, and under that legislation we gave to the Shipping Board authority to sell or charter ships. But we wrote into that law no provisions similar to the ones which are to be found in the pending bill. In 1936 we repealed the 1928 Shipping Act and we wrote other legislation, and in it we gave authority to the Maritime Commission to sell vessels not needed for the commerce of the United States. But in that act we do not find any such limitations upon the discretion, authority, and action of the Maritime Commission similar to the provisions written into the pending bill.

This bill runs counter to the history of the United States in the last 30 years in the maritime field. The only reason I can see for the bill, Mr. President, is a desire of the Maritime Commission to escape the responsibility and the exercise of the authority which heretofore we have vested in that body . . .

But in the pending bill, by removing from the Maritime Commission the obligation to exercise discretion and responsibility, we are undertaking to substitute for its discretion and responsibility a statement of the terms and conditions under which such sales may be made and we are undertaking to establish the rigidity of law in place of the exercise of sound discretion by a regulatory body. I say such a procedure will hinder the sale of vessels . . .

The only way to move the ships is to trade with the rest of the world and to vest in someone in this Government—and I have no hesitancy in saying that it should be the Maritime Commission—authority and discretion in the matter, and to compel it to take the responsibility and to meet the conditions as it views them.

MR. RADCLIFFE, MR. MAGNUSON, and MR. HART addressed the Chair.

The PRESIDING OFFICER (MR. TUNNELL in the chair). Does the Senator from Maine yield; and if so, to whom?

MR. WHITE: I yield first to the Senator in charge of the bill.

MR. RADCLIFFE. Mr. President, the fact is that the House of Representatives and the members of the Senate Commerce Committee, after a long and careful study, have reached a conclusion entirely different from the views of the Senator from Maine. (91 Cong. Rec. 11863 (1945)).

During House debate, emphasis was placed on the differences between the views of Executive Branch proponents of the legislation and the views of the members of the Committee on Merchant Marine and Fisheries. The proponents of the bill made it clear in repeated statements that the Committee drafted detailed mandatory provisions for the very purpose of making sure that the Congressional policy would be set forth in unmistakable terms. Each of the representatives quoted below was a member of the Committee. Thus:

MR. BLAND. May it not be said that this is a committee bill prepared by the committee from all of the information it could get?

MR. BRADLEY of Michigan. I agree with the gentleman and it has been brought forth by the committee despite bureaucratic efforts to emasculate it. (91 Cong. Rec. 9166 (1945)).

The Statute was given unusually careful and extensive consideration in the Congress.[4] The Congressional managers of, and spokesmen for, the legislation made it abundantly clear that they deliberately set out to write a detailed mandatory set of instructions for the Maritime Commission, to avoid the mistakes made after World War I. They rejected efforts to widen administrative discretion. They produced, and the Congress enacted, a statute unusually detailed and precise. The Ship Sales Act, so drafted, entrusted the Maritime Commission with the administration, not the formulation, of a ship-disposal and chartering policy.

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[4] Judge Bland, Chairman of the House Committee on Merchant Marine and Fisheries, when first reporting the bill, described its drafting history in language which, coming from a veteran of his standing in the House, is a striking testimonial to the extraordinary attention the committee gave this statute:

> The bill is one of the most difficult bills that I have had anything to do with in my 27 years of service in this House. It far exceeds the 1936 act, which was considered by the Committee on Merchant Marine and Fisheries while I was serving as chairman. There are more complications; less unanimity among interests that ought to be united in presenting a bill. More questions have arisen than in any other bill we have considered. Its preparation has taken much more time than I could have desired and could have believed was possible, because we have gone over the bill many times, considered many prints, and tried to reconcile as nearly as we could, the various opposing interests. (91 Cong. Rec. 9162 (1945)).

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 137

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 5) and its supplementary findings of fact and conclusions of law (R. 26) are reported at 202 F. Supp. 297, and 210 F. Supp. 822, respectively. The opinion of the court of appeals (R. 247) is reported at 312 F. 2d 214.

JURISDICTION

The judgment of the court of appeals (R. 260) was entered on January 8, 1963. The petition for a writ of certiorari was filed on May 16, 1963, and was granted on October 14, 1963 (R. 262). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners ("Eastern") entered into contracts with the Maritime Commission for the chartering of government vessels in 1946. The charters provided that Eastern would pay, on a sliding scale, from 50 to 90 percent of any excess profits. Subsequently, in August 1947, pursuant to a provision in the charters allowing it to terminate on 15 days' notice, the Commission told Eastern that the charters would be terminated unless it agreed to new charters which provided for the same rates but for an altered method of accounting. Eastern agreed.

The questions presented are:

1. Whether Eastern is precluded from contesting the validity of the charters (both old and new) since it voluntarily agreed to them and benefited from them.

2. Whether Eastern may avoid express provisions, common to both the old and new charters, that the profit-sharing rental shall vary from 50 to 90 percent of excess profits, on the ground (1) that Section 709(a) of the Merchant Marine Act of 1936 provides that the Commission shall collect 50 percent of excess profits and this section precluded the Commission from entering into a contract providing for a higher rate of profit sharing under Section 5(b) of the Merchant Ship Sales Act of 1946; or (2) that, even if Section 709(a) does not limit the Commission's powers under Section 5(b), the profit-sharing provisions were based on Section 709(a) rather than Section 5(b).

3. Assuming, *arguendo*, that the Commission was precluded from entering into such charters with Eastern, whether the United States is nevertheless

entitled to compensation *quantum valebat* for Eastern's use of government vessels.

4. Whether Eastern may avoid the accounting provision of the new charters, *i.e.*, that there shall be separate calculation of profit-sharing rentals after September 1, 1947, on the ground that the new agreement was coerced and that its effect was to divide 1947 into two parts for profit-sharing purposes while Section 709(a) provides for "calendar year" accounting.

STATUTES INVOLVED

The pertinent provisions of the Merchant Ship Sales Act of 1946 and of the Merchant Marine Act of 1936 are set forth in the Appendix, *infra*, pp. 46–49.

STATEMENT

Congress enacted the Merchant Ship Sales Act on March 8, 1946, authorizing the United States Maritime Commission to sell or charter vessels constructed for the government during World War II. Since the primary object of the Act was to sell vessels, chartering was delayed and discouraged.

1. *Chartering under the Merchant Ship Sales Act of 1946.*—Pending implementation of the Maritime Commission's authority to charter governments vessels under the 1946 Act, the War Shipping Administration ("WSA") engaged in an interim program, designed as an experiment, to test the rate suitable for chartering (R. 44–45).[1] WSA devised a standard

[1] WSA was authorized to charter out government vessels under Public Law 101, 77th Cong., 1st Sess., 55 Stat. 242 (1941), and Executive Order No. 9054 (7 Fed. Reg. 837 (1942)).

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charter ("Form No. 203," 11 Fed. Reg. 4669 (1946)) which specified a rental composed of two elements: (a) a "basic charter hire" consisting of a low, firm monthly amount, and (b) an "additional charter hire" consisting of one-half of any net profits in excess of a 10 percent annual return on the charterer's capital investment.

During the interim period, a Special Charter Committee composed of several senior officials of the Maritime Commission was developing provisions for chartering under the 1946 Act. Studies showed that postwar freight rates generally were high (R. 52), and that many shipping operations were extremely profitable and had resulted in exorbitant returns to WSA charterers (R. 49, 53), although other operations were less remunerative (R. 49, 55). All members of the Committee agreed that government vessels were being rented too cheaply under the low WSA rates and that higher rentals were necessary to promote the sales policy of the 1946 Act (R. 143, 148). They said that the Commission's duty, as the government's "prudent businessman," [2] was to determine the most equitable and satisfactory method for accomplishing that result (R. 143–149).

A majority of the Committee agreed that imposition of a firm rental substantially higher than that utilized

[2] Section 713 of the Merchant Marine Act of 1936 (46 U.S.C. 1203) was made applicable to chartering under the 1946 Act by Section 5(c) of the latter statute (50 U.S.C. App. 1738(c)). Section 713 required the Commission to consider, in chartering, "factors that would be considered by a prudent businessman in entering into a transaction involving a large investment of his capital * * *."

by WSA[3] might possibly be unfair to some prospective 1946 Act charterers, since a few operations were relatively unremunerative and freight rates fluctuated (R. 55–56). It was accordingly recommended that the Commission utilize a low firm rental similar to that charged by WSA, but that the contingent profit-sharing rental be greater than the 50 percent profit-sharing rate which was being used by WSA and which was required by Section 709(a) of the Merchant Marine Act of 1936.[4] Recommendations for such contingent profit-sharing rates ranged from 66⅔ percent to 90 percent (R. 144, 149).

The Commission considered these recommendations pursuant to the direction of Section 5(b) of the 1946 Act that it establish a rate "consistent with the policies" of the Act, and elected to adopt a modified form of the majority proposal. On August 9, 1946, it selected as the proper rate a combination of a min-

[3] WSA's primary "basic charter rate," although expressed in terms of a flat monthly dollar amount, was equal to 15 percent per annum of the mean of the unadjusted statutory sales price and the "floor price" of the vessels as determined under Section 3 of the 1946 Act (50 U.S.C. App. 1736) (R. 53).

[4] The rationale was expressed as follows: "The charterer is in better position on a low basic charter [hire] and a high recapture [profit-sharing hire] than he would be if the position were reversed because in the first instance a more liberal portion of the overall charter hire is payable out of profits, if earned, whereas, in the second instance, a much greater charter hire would be paid whether there were *any* profits or not" (R. 154–155). A higher firm rental "imposed much greater risks of loss on the charterers" (R. 149) whereas a higher contingent rental would enable both the Commission and the charterers to adapt "to the fluctuations of world market rate[s]" (R. 146).

imum firm rental (15 percent per annum of the unadjusted statutory sales price or the "floor price" of the vessel, whichever was higher) and profit sharing of from 50 to 90 percent of the charterers' excess net profits (R. 64–72). The Commission advised the WSA charterers, including Eastern, of the rate thus selected (R. 85–86).

On September 4, 1946, the Commission formally approved the terms of the standard charter to be used in chartering under the 1946 Act ("Form No. 303," 11 Fed. Reg. 9936 (1946)). Clauses C(1), 12 and 13 contain the firm and profit-sharing rental provisions selected on August 9, 1946, and are identical with those subsequently agreed to by Eastern (R. 181–184).

2. *Eastern's Original Charter Under the 1946 Act.*— Prior to the Commission's formulation of chartering terms under the 1946 Act, Eastern applied for the use of a single vessel (R. 202–203). After the "Form No. 303" charter rates were announced, it specifically and unqualifiedly accepted them (R. 206), executing the charter on November 7, 1946 (R. 180–182).

In addition to the single vessel originally chartered, Eastern requested and obtained nine other government vessels at the same rates and under the same terms (R. 186, 188, 190, 192, 194, 196). At no time did Eastern object to the rental provisions of its charter (R. 178). None of its many accountings for, and payments of, the profit-sharing rental was accompanied by any protest or intimation of dissatisfaction (R. 176–

180).[4] Far from objecting to the provision for payment of a graduated scale of excess profits, Eastern twice urged that the Commission permit it to use a particularly desirable government vessel for 100 percent of all profits plus an additional $200,000 (R. 208–210). More than two years after termination of the charter, Eastern filed a final accounting, calculated the profit-sharing rental in accordance with Clause 13, and submitted an accountant's certificate attesting to its correctness (R. 220–226).

3. *The Addendum Agreed to by Eastern.*—Although the profit-sharing rental under "Form No. 303" charter was higher than that previously charged by WSA under "Form No. 203," rising market conditions encouraged increased private use of government ships and the number of chartered vessels more than doubled between August 31, 1946, and June 30, 1947 (R. 159). In reluctantly reporting out legislation to continue the Maritime Commission's chartering authority, the responsible Congressional committees said in June 1947 that they were doing so with the understanding that both the firm and profit-sharing rentals "will be immediately increased" so as to discourage chartering (R. 157–158). S. Rep. No. 392, 80th Cong.,

[4] While certain industry associations had earlier suggested alternative profit-sharing rentals and had argued that the proposed rates were excessive (R. 154–155), nothing in the record shows that Eastern was a member of these associations, ever subscribed to that view, or made any protest whatsoever until February 15, 1955 (R. 179)—more than eight years after execution of the charter and more than seven years after chartering had terminated.

1st Sess. 3 (1947); H. Rep. No. 725, 80th Cong., 1st Sess. 2 (1947).

Shipping interests reacted immediately. Owners of private vessels complained of decreasing shipping rates and of government over-chartering (R. 159–160). Charterers of government vessels complained that the falling market would not sustain increased Commission rates (R. 161–163).

On August 14, 1947, the Commission decided to exercise its right to terminate all existing "Form No. 303" charters in accordance with contract terms permitting cancellation on 15 days' notice (R. 163, 184). When the charterers were so advised (R. 233), they urged that the Commission continue to charter on new terms in order to protect the charterers from loss of highly remunerative subcharters (R. 164–165). On August 20, 1947, the Commission advised Eastern and others that the previous termination notice would remain effective except as to those charterers who desired to accept an addendum to the charter ("Foreign Trade Addendum") (R. 165). The addendum stated that it replaced the original charters, provided for continuing the firm and profit-sharing rates in the original charters, but called for separate calculation of profit-sharing rentals after September 1, 1947 (R. 165, 234–236). The latter provision was designed to prevent charterers from offsetting any future losses against the high excess profits they had received before September 1, 1947 (R. 166).

Eastern promptly accepted the Commission's offer without qualification (R. 237), executed the addendum

to the charters (R. 198–201), continued to operate chartered vessels, submitted accountings thereunder, and made no protest until it filed the libel in this case seven years later (R. 175–179). As a result of the addendum, Eastern did not receive credit for losses it incurred after September 1, 1947, for purposes of computing the profit-sharing rental for excess profits earned before that date (R. 112).

4. *The Decisions of the Courts Below.*—Eastern filed a libel on May 10, 1955, for recovery of some $260,000 collected by the Maritime Commission under the allegedly illegal profit-sharing provisions and the addendum (R. 5). Eastern claimed that the profit-sharing rental was invalid because the Merchant Marine Act of 1936 provided that charters with the Commission shall provide for the payment of 50 percent of excess profits. They argued that the new charter was likewise illegal because the Merchant Marine Act provided for "calendar year" accounting while the addendum provided for dividing the year 1947 into two parts in computing the profit-sharing rental. The government cross-libeled for approximately $64,000 in charter hire still owing under the terms of Eastern's contracts (R. 7).* The district court sustained both the profit-sharing rental provision and the new charter (R. 5–33). Eastern's libel was therefore dismissed and judgment was entered on the government's cross-libel (R. 34–35).

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* Three additional causes of action were asserted in the cross-libel. One was dismissed on the merits and two were settled by the parties (R. 34–35).

The court of appeals affirmed (R. 260–261). Observing that the charter was an integrated agreement and that the Commission "had a single, overall obligation to fix a charter hire" (R. 251–252), the court found no significance in the Commission's choice of a rental combining firm and contingent rates. It assumed that the Commission had determined the firm portion of the rental to be consistent with the statutory policies only if "accompanied by the contingent obligations" (R. 253), and held (R. 259) that the Commission therefore had authority to require payment of more than 50 percent of profits.

The court below similarly rejected Eastern's attack on the new addendum. Since the original charter was terminable at will (R. 259), the Commission's exercise of that power and the grant of a new charter on different terms did not violate the statute (R. 260).

SUMMARY OF ARGUMENT

I

Eastern agreed to the charters, which they now claim the Maritime Commission had no authority to enter, and accepted the benefits of them. Numerous decisions of this Court make clear that if a party elects to proceed under a contract, it cannot later claim that the government did not have statutory authority. *E.g., Matson Navigation Co.* v. *United States*, 284 U.S. 352, 357, 358. Consequently, whatever validity Eastern's contentions might have on their merits, Eastern has waived any rights it had.

II

Congress gave the Maritime Commission full authority in Section 5(b) of the Merchant Ship Sales Act of 1946 to devise rates for the private chartering of government vessels which "the Commission determines to be consistent with the policies of this Act"—*i.e.*, the promotion of sales rather than charters. Section 5(b) specified a minimum firm rate below which the Commission could not exercise discretion, but did not specify any maximum firm rate or prohibit a contingent profit-sharing rate. Section 709(a) of the Merchant Marine Act of 1936, which is made applicable under the 1946 Act, requires that charterers pay one-half of any excess net profits. However, its rental provision did not limit the Commission's right and duty under Section 5(b) to establish rentals promoting the policies of the 1946 Act, and therefore the Commission could properly agree to a profit-sharing rental of over 50 percent.

The Commission and Eastern agreed to rates composed of a low firm rental plus a contingent profit-sharing rental of over 50 percent of excess profits when excess profits were above a certain amount. In so doing, the Commission attempted to further the sales policy of the 1946 Act while protecting prospective charterers from the risks of a high firm rental. The Commission has consistently interpreted its authority to allow profit-sharing rentals of over 50 percent and this interpretation has been approved by Congress.

The charter was not invalid because it did not specify that the profit-sharing rental of over 50 percent was based on Section 5(b) rather than 709(a).

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It seems obvious that the Commission was proceeding under Section 5(b), since Section 709(a) requires only a 50 percent rate. But, in any event, it is irrelevant under which section the Commission might have thought it was proceeding. Since the Commission had authority to agree to the profit-sharing rate, the charters were valid.

III

If the rental provisions in the charters are held to be invalid, Eastern is still not entitled to the rental of the vessels at the low firm rates. Instead, since one of two complementary rental provisions would be invalid, the United States could recover the value of the vessels' use on a theory of unjust enrichment. *E.g., Clark* v. *United States,* 95 U.S. 539. Since market chartering rates were higher than the rentals paid by Eastern, it would be liable for at least as much as the payments required under the charters.

IV

The addendum by which the Commission and Eastern agreed to replace the original charters was valid. Both parties had the right to terminate the original charters on 15 days' notice. Consequently, the Commission could properly inform Eastern and the other charterers that the charters would be terminated unless a new agreement was made, whether or not the Commission was attempting to obtain a new contract more favorable to the government.

The addendum did not violate the provision of Section 709(a) providing that the payment of 50 percent of excess profits should be computed on a calendar-year basis. While the addendum resulted in splitting the year 1947 for profit-sharing purposes, Section 709(a) applied only to single charters whereas the addendum was explicitly a separate charter for accounting purposes. In any event, since Section 709(a) merely provided a minimum profit-sharing rate in order to protect the government, it did not confer any rights on charterers.

ARGUMENT

Eastern entered into an agreement with the Maritime Commission to charter vessels from the latter in return for a firm rental plus a share of excess profits (a sliding scale of 50 to 90 percent, depending upon the volume of the profits) earned under the charters. Eastern now challenges these charters on the ground that the Commission had no authority to agree to them. We argue at the threshold that Eastern is estopped from challenging the contracts to which it agreed and from which it benefited. We urge further that the Commission did have authority under the Merchant Ship Sales Act of 1946 to enter the agreements in question.

I

EASTERN HAS WAIVED ANY RIGHT TO CHALLENGE THE AUTHORITY OF THE COMMISSION SINCE IT VOLUNTARILY AGREED TO THE CHARTERS AND BENEFITED FROM THEM

Eastern accepted the charters that it now seeks to challenge, without duress or coercion (as to the addendum, see pp. 38–43 below). Under these circumstances, Eastern should not be permitted to contend that the terms were beyond the discretion conferred by statute on the Maritime Commission. To allow Eastern to have the benefit of the contract without being bound by its burdens would confer on it an unearned windfall as compared to those who chartered vessels on the same basis and lived up to the terms of their commitments.

One cannot invoke the discretion of a federal agency, receive benefits through the exercise of that discretion, and then seek greater benefits by asserting that the original exercise of agency discretion involved a method of computation which was in violation of the statutory authority under which the agency acted. *Callanan Road Co.* v. *United States,* 345 U.S. 507, 513; *Commissioner* v. *National Lead Co.,* 230 F. 2d 161, 163–164 (C.A. 2), affirmed on other grounds, 352 U.S. 313; cf. *Federal Power Commission* v. *Colorado Interstate Gas Co.,* 348 U.S. 492, 497–498; *United States* v. *Edmondston,* 181 U.S. 500, 515. In *Matson Navigation Co.* v. *United States,* 284 U.S. 352, 357–358, this Court held that, if a party elects to proceed under a contract with the United States, it should be bound by its terms even where a constitu-

tional as well as a statutory right is involved. Similarly, one cannot accept benefits under a contract or acquiesce in its terms and later claim that the terms of the statute under which the contract was authorized have not been followed. *Stearns Co.* v. *United States,* 291 U.S. 54, 61–62; *Louisville & Nashville R.R. Co.* v. *United States,* 267 U.S. 395, 401–402; *American Smelting Co.* v. *United States,* 259 U.S. 75, 78–79; *Oregon-Wash. R.R. Co.* v. *United States,* 255 U.S. 339, 345; *Parish* v. *United States,* 8 Wall. 489, 490; *Gibson* v. *Lyon,* 115 U.S. 439, 447–448; *Thredgill* v. *Pintard,* 12 How. 24, 38; *St. Louis Hay & Grain Co.* v. *United States,* 191 U.S. 159, 164; *Silliman* v. *United States,* 101 U.S. 465, 469–471. As this Court said in *Parish* v. *United States, supra,* 8 Wall. at 490:

> If the claimants had any objections to the provisions of the contract they signed, they should have refused to make it. Having made it, and executed it, their mouths are closed against any denial that it superseded all previous arrangements.'

In short, having agreed to the charters and accepted the benefits, Eastern has waived any claims it might

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' Eastern's libel, as opposed to the government's cross-libel, is also without merit because it is barred by the statute of limitations (46 U.S.C. 745) and because Eastern voluntarily paid the Commission. See *American-Foreign Steamship Corp.* v. *United States,* 291 F. 2d 598 (C.A. 2), certiorari denied, 368 U.S. 895. These defenses were pleaded by the government, but no evidence was introduced as to them by either party since the hearing was confined to the issues now before this Court. Consequently, if this Court were to reverse the judgment in favor of the government, the government's defenses would remain for consideration by the district court on remand.

have had that the charters were beyond the authority of the Commission.[8]

II

THE COMBINATION OF FIRM AND PROFIT-SHARING RENTALS WAS AUTHORIZED BY SECTION 5(b) OF THE MERCHANT SHIP SALES ACT OF 1946

The Merchant Marine Act, 1936, provided for the chartering of subsidized vessels. Section 707, 46 U.S.C. 1197, gave the Commission authority to charter vessels "to the bidder proposing to pay the highest monthly charter hire," unless the Commission con-

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[8] In addition, Eastern never challenged either the original or substituted charters until it brought this libel over seven years after the substituted charter was terminated. It made no protest in making numerous accountings and payments to the Commission. Indeed, on two separate occasions, Eastern urged the Commission to charter to it particularly desirable vessels on the basis that Eastern would pay more than the contingent rental of 50 to 90 percent of excess profits in the charters involved here—*i.e.*, that it would pay 100 percent "of *all profits* and $200,000 additional to the Commission" (R. 208, 210).

The district court found that Eastern protested the profit-sharing rate in the original contract individually and as a member of a trade association (R. 13), in contrast to its finding that Eastern made no protest as to the substituted charters (R. 33). However, this first finding is completely unsupported by the record. Eastern itself never protested the original contracts. While the American Merchant Marine Institute did protest (R. 154), there is no indication in the record that Eastern was a member of this association and even now Eastern makes no such claim (see Br. 7, 38–39). And even if Eastern had been a member, the protest of an industry association to a standard charter does not constitute the objection of a particular member to a particular contract to which it agreed.

sidered the offer too low or believed the bidder did not have the capital, credit, or experience to operate successfully. Section 709(a), 46 U.S.C. 1199(a), required, in addition, that the Commission include in charters the requirement that the hire include a contingent rental of 50 percent of excess profits as defined in that section.

After World War II, Congress passed the Merchant Ship Sales Act of 1946 providing for the sale, and, if this proved impossible at a fair price, the chartering of vessels built by the government during the war. The Act provided in Section 5(b), 50 U.S.C. App. 1738(b), that, with certain restrictions including Section 709(a) of the 1936 Act, chartering should be at rates determined by the Commission "to be consistent with the policies of this Act."

Once Congress has given government agents the power to charter vessels—which Congress did in the Merchant Ship Sales Act of 1946—the presumption is that the agents are to secure the best available terms. Therefore, the real question here is not whether Congress intended that the Commission agree to certain rentals but whether it intended to forbid the Commission from entering the charters involved here. "Where there is no prohibition of a particular type of contract and no direction to use a particular type, the contracting officers are free to follow business practices." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 116. In short, Eastern has the burden of showing that Congress had prohibited the rental provisions which it attacks.

We will show, *first*, that Section 5(b) of the 1946 Act itself authorizes the rentals in question; *second*, that Section 709(a) of the 1936 Act was not violated by those rentals; and, *third*, that Congress specifically approved of the consistent administrative practice involved in these cases.

A. SECTION 5(b) OF THE 1946 ACT AUTHORIZED THE COMMISSION TO ENTER CONTRACTS PROVIDING FOR A FIRM RENTAL, PLUS A PERCENTAGE OF EXCESS PROFITS

The authority of the Commission to set rentals for charters under the Merchant Marine Sales Act of 1946 comes from Section 5(b) of the Act. That Section directs the Commission to establish any rates which it determines "to be consistent with the policies" of the Act. The basic policy of the statute, as indicated by its title, was to promote the sale of ships; they were to be chartered only if sale proved impracticable. Section 5(a), 50 U.S.C. App. 1738(a), prohibited chartering vessels not previously offered for sale and Section 7(a), 50 U.S.C. App. 1740(a), required the Commission to prefer purchase applications over charter applications. Senate Report Number 807, 79th Cong., 1st Sess. 13 (1945), expressly stated: "Inasmuch as the policy of the measure is to put as many war-built vessels as possible into private ownership, the Commission is directed not to approve applications to charter unless such chartering is consistent with the policies of the act." See also H. Rep. No. 831, 79th Cong., 1st Sess. 3, 8 (1945). Consequently, the affirmative authority con-

ferred on the Commission by Section 5(b) was qualified only by the requirement that the rental be high enough to encourage ship sales—a policy inconsistent with any purpose to confer economic advantages upon charterers.

After affirmatively granting authority to the Commission, Section 5(b) goes on to impose two restrictions, both of which put a floor under charter rates. First, except upon the vote of four members of the Commission, the rate cannot "be less than 15 per centum per annum of the statutory sales price" of the vessel. Second, if the rate differed from 15 percent of the vessel's sale price, it was not to "be less than the prevailing world market charter rates for similar vessels for similar use as determined by the Commission."* The first of these restrictions expressly requires that the rental include a firm rate of a particular amount unless the Commission made an exception. In stating, however, that the rental shall not be less than this amount, the statute does not bar a higher rental or limit the form in which a higher rental may be prescribed. Nor does the second restriction prevent the Commission from exercising its authority to impose a higher rate, or limit the Commission in determining the proper form of such a rate. In short, Section 5(b) neither establishes a maximum rate nor limits the form of the rate; its

*The district court stated that this restriction applied only if the rate was less than 15 percent of the vessel's sale price (R. 22–23), but the language of the statute seems to make it apply to firm rates over 15 percent and to profit-sharing rates as well.

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manifest purpose was to keep rates up, thus encouraging sales. See *United States* v. *East Harbor Trading Corporation*, 190 F. Supp. 245, 248 (S.D. N.Y.); *American President Lines, Ltd.* v. *United States*, 265 F. 2d 552, 553 (C.A. 3), affirming 162 F. Supp. 732, 743 (D. Del.); *United States* v. *Eastport Steamship Corporation*, 216 F. Supp. 649, 653 (S.D. N.Y.).

The rentals involved in this case complied fully with the above provisions. The charters provided for a firm rental of 15 percent of the vessels' sales price. In addition, they included a contingent profit-sharing rate (50 to 90 percent of excess profits) calculated to implement the basic statutory policy.

Eastern claims (Br. 13) that a "profit sharing arrangement does not qualify as a 'rate' of bareboat charter hire * * * in any normally accepted sense." Since Section 5(b) gives the Commission authority only to establish rates, Eastern claims that the entire profit-sharing rental was invalid. Eastern's view, however, conflicts with established practices in the shipping industry. *Pan American Airways, Inc.* v. *Quiles*, 154 F. 2d 496 (C.A. 5); *Polar Steamship Corp.* v. *Inland Overseas S. Corp.*, 136 F. 2d 835, 837 (C.A. 4), certiorari denied, 320 U.S. 774; *The Nat E. Sutton*, 42 F. 2d 229, 231 (E.D. N.Y.).[10] A rental combining a minimum fixed amount with an additional profit-sharing rental is a common commercial device. Note, *The*

[10] See also *Barreda* v. *Silsbee*, 21 How. 146, 161; *Spring* v. *Gray*, 6 Pet. 151, 164–165; *Sproat* v. *Donnell*, 26 Me. 185, 187; *Felton* v. *Deall*, 22 Vt. 170; 18 L.R.A. (N.S.) 963, 1045–1046 (1909); Cooley, *Chartering and Charter Parties* (1947), 51.

Percentage Lease—Its Functions and Drafting Problems, 61 Harv. L. Rev. 317, 322 (1948); 38 A.L.R. 2d 1113, 1127 (1954); McMichael, *Leases; Percentage, Short and Long Term* (3d ed. 1925), *passim*; McMichael & O'Keefe, *Leases; Percentage, Short and Long Term* (5th ed. 1959), pp. 8, 34–36, 49. In addition, as we have seen, petitioners' argument ignores the express language of Section 5(b), which contains no indication that the Commission's discretion was confined to utilization of only a firm rental; rather, Section 5(b) allows, and in fact requires, the Commission to agree to rates "consistent with the policies of this Act."

B. THE PROVISION OF SECTION 709(a) OF THE 1936 ACT THAT THE COMMISSION REQUIRE PAYMENT OF 50 PERCENT OF EXCESS PROFITS DID NOT PRECLUDE THE COMMISSION FROM CONTRACTING FOR HIGHER PROFIT SHARING UNDER SECTION 5(b), NOR REQUIRE THE CHARTERS TO SPECIFY THAT THE HIGHER RATE WAS BASED ON SECTION 5(b)

Section 709(a) of the Merchant Marine Sales Act of 1936 did not give the Commission any affirmative authority to set rates. That authority was conferred by Section 707(a) which provided that subsidized vessels should be chartered to the highest bidder, so long as the Commission did not deem the rates too low or determine that the bidder lacked sufficient capital, credit, or experience to be successful. However, Section 709(a) limited the Commission's authority by requiring a rental of 50 percent of excess profits. As to war-built vessels chartered under the Merchant Ship Sales Act of 1946, Section 5(b), as we have seen, gave the Commission its basic authority in setting charter rates. Section 5(c) of the 1946 Act provides, moreover, that various sections of the 1936 Act (including Section

709(a)) shall be applicable to charters made under the later statute.

Section 709(a) requires that every charter entered into by the Commission include a provision that the charterer pay 50 percent of all profits beyond 10 percent of "the charterer's capital necessarily employed in the business of such chartered vessels." In our view, the contracts involved in this case are fully consistent; they provided for payment of 50 to 90 percent of excess profits, *i.e.*, more than the 50 percent which Section 709(a) required the Commission to include in all charters.

1. Eastern contends (Br. 12–32) that Section 709(a) precluded the Commission from contracting for a graduated profit-sharing rental of over 50 percent. As we have seen (pp. 18–21), Section 5(b), and not Section 709(a), gave the Commission authority to enter charters providing for profit-sharing rentals. That authority to agree to rentals which "the Commission determines to be consistent with the policies of this Act" allowed the Commission to have firm or contingent rentals. While Section 709(a) required that the Commission receive payment of at least 50 percent of excess profits, there is nothing in that Section to preclude the Commission from negotiating an agreement for payment of a greater proportion. In the absence of a clear statutory limitation, government agents may surely make a better bargain than Congress demands. *United States* v. *Edmondston*, 181 U.S. 500; *Gilbert & Secor* v. *United States*, 8 Wall. 358, 361.

This construction is consistent with the purposes of both Section 709(a) and Section 5(b). Eastern's own account of the legislative history of the 1936 Act (Br. App. B2–B5) shows that Section 709(a) was designed to prevent a give away (R. 257–258).[11] See *Seas Shipping Co.* v. *Commissioner*, 1 T.C. 30, 39. Thus, it provided for a minimum rental. It may have been true, as the court of appeals noted (R. 255), that the 50 percent of excess profits constituted, in practice, a maximum under the 1936 Act because Section 707(a) provided for award of charters to bidders paying "the highest monthly charter hire." Since this figure could only be computed from the firm rental offered, charterers had no incentive to offer a higher profit-sharing rate. Nonetheless, the purpose and legal effect of Section 709(a) in 1936 were to establish a minimum rental.[12] *A fortiori*, Section 709(a) only established a minimum when it was incorporated into the 1946 Act—an Act which gave the Commission itself the power to establish rates.

As already made clear, this construction of Section 709(a) is consistent with the clearly stated purpose of the Merchant Ship Sales Act of 1946—to promote ship sales rather than charters. Indeed, unless the Commission had power to increase the profit-sharing

[11] On the other hand, Eastern's legislative history is inconclusive at best as to whether Congress also intended to benefit charterers by establishing a maximum profit-sharing rental.

[12] Contrary to Eastern's statement (Br. 25), the court of appeals did not hold that the 50 percent rental in Section 709(a) was *legally* both a minimum and maximum under the 1936 Act (see R. 255).

rental above 50 percent of excess profits, it could not have met the requirement of Section 5(b) of the 1946 Act that rental rates be set so as to promote sales. As was noted in *American President Lines, Ltd.* v. *United States, supra,* 265 F. 2d at 553: "In all instances of charter hire the Commission had to refrain from contracting for hire which would be far less than the market could bear. For if the hire were made too attractive the pronounced policy to demise vessels outright would be thwarted. No prudent businessman would purchase a commodity which could be leased at a comparatively more favorable price." It is not disputed that the world market rate for annual charters, at the time of the charters in this case, was approximately 45.6 percent of the statutory sales prices (R. 151). Consequently, the firm rental provided by Section 5(b)—15 percent of statutory sales prices—obviously would have made purchases of vessels unattractive to potential buyers. While it is true that Section 5(b) allowed the Commission to set a higher firm rental, this would have interfered with the Commission's desire to protect charterers from losses when world shipping rates declined (see p. 5, note 4 above).[13] A profit-sharing rental on a graduated scale

[13] It is true that charterers, like the government, could terminate the charters on 15 days' notice (R. 184). However, this would presumably occur only if market conditions were seriously depressed. Moreover, it would result in government vessels being neither sold nor chartered, contrary to the purpose of Congress in passing the 1946. Consequently, a high profit-sharing, rather than a higher firm, rental was not only consistent with Section 5(b) but to the benefit of both charterers and the government.

enabled the Commission to encourage sales while still protecting charterers.[14]

Of the five decisions which have held that rental provisions calling for more than 50 percent profit-sharing may be invalid, four have agreed, or at least assumed, that Section 709(a) does not limit the Commission's powers under Section 5(b). *American Export Lines, Inc.* v. *United States*, 153 Ct. Cls. 201, 290 F. 2d 925; *American Mail Line, Ltd.* v. *United States*, 213 F. Supp. 152 (W.D. Wash.); *Dichman, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (S.D. N.Y.); *United States* v. *East Harbor Trading Corporation*, 190 F. Supp. 245 (S.D. N.Y.);[15] but see *American*

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[14] Eastern relies (Br. 16–17) on two "well-settled rules of statutory construction": that Section 709(a), not Section 5(b), governs because the former is the more specific statute and "where a statute directs a government agency to act in a specific manner, that direction includes a mandatory negative." Both these rules, however, are inapplicable. The first rule assumes, without helping to decide, the basic issue whether Section 709(a) conflicts with Section 5(b) at all. It is the government's position that the two are completely consistent since Section 709(a) only establishes a minimum rate (see pp. 21–24 above). And it is a principle of statutory construction to attempt to harmonize statutory provisions rather than to decide which governs when they conflict. The second rule does not apply since it is inconsistent with the language and purpose of both Sections 709(a) and 5(b) to read the former as prohibiting rentals above 50 percent of excess profits.

[15] More recently, a decision in the same district has held to the contrary. *United States* v. *Eastport Steamship Corporation*, 216 F. Supp. 649 (S.D. N.Y.). Earlier, in *Sword Line* v. *United States*, 228 F. 2d 344, 346, affirmed, 230 F. 2d 75 (C.A. 2), affirmed on other grounds, 351 U.S. 976, Judge Learned Hand hypothesized *arguendo* that Section 709(a) established a maximum profit-sharing rental.

President Lines, Ltd. v. *United States,* Admiralty Nos. 28426, 28705, N.D. Cal., October 10, 1963 (not yet reported) (see Pet. Br. App. A1–A15). These cases held that the profit-sharing rentals in the charters were based on Section 709(a), and that this section does not authorize such rentals at over 50 percent. However, with the exception of the *American President Lines* case, they proceed on the premise that Section 5(b) of the Merchant Ship Sales Act authorizes the Commission to contract for additional rental above 50 percent of excess profits.

2. Eastern also contends (Br. 33–42) that the profit-sharing provisions in the charters were invalid even if Section 709(a) does not bar such an arrangement when consummated under Section 5(b). Its argument, relying on the cases cited above, is that the rental provisions in these charters were invalid because they were based on Section 709(a), which does not authorize them, rather than on Section 5(b). The decisions adopt the view that Section 709(a) divides rental into two parts: "charter hire reserved in the charter" which is based on Section 5(b) and "additional charter hire" which is based on Section 709(a); that the firm rental in the charters constituted the "charter hire reserved in the charter" and thus exhausted the Commission's power under Section 5(b); and that the Commission had no authority to agree to a sliding rental of more than 50 percent under Section 709(a).

Whether the Commission intended the profit-sharing rental to be based on Section 709(a) is, we submit, irrelevant. Admittedly, Section 709(a) did not pro-

vide affirmative authority for a profit-sharing rental of over 50 percent. But, as we have seen (pp. 18–21), Section 5(b) did give the Commission this power. Neither section required that rental provisions be based specifically on one of the two sections. The validity of the rental provisions therefore does not depend on what the Commission thought was the proper source of its authority. As the court of appeals stated, "To say that the Commission stultified itself by its choice of format is to elevate semantics above substance" (R. 252).

Eastern responds (Br. 41–42) that a reviewing court must judge the legality of administrative action by reference to the grounds of the agency's determination. This is doubtless true where the agency has exercised discretion and this determination depends on *its* view of the applicable law. If the agency misconstrues the law relating to the legal standards governing its discretionary action, the action is necessarily infected with the error. Looking to the wrong source of authority, however, where the standards are the same, has no such consequences. Here, even if the Commission did rely on Section 709(a) and not 5(b) in agreeing to the profit-sharing rate of over 50 percent, its determination could not have been affected. Section 709(a) sets up no criteria for establishing a rate different from Section 5(b). On the contrary, Section 709(a) of the 1936 Act is applicable only because it has been specifically incorporated into the 1946 Act. Therefore, the determination under Section 709(a) would be governed by Congress' purpose under the 1946 Act—the same standard specifically applica-

ble under Section 5(b). In the words of the district court, "Nor is there the slightest ground for assuming that if the Commission had been apprised of the correct source of its authority, the Commission or the other party would have made a contract different in substance as distinguished from wording" (R. 19).

We point out additionally that there is nothing in the charters stating that the profit-sharing provisions were based on Section 709(a) rather than Section 5(b). The only possible indication that the firm rental was based on Section 5(b) and the profit-sharing rental on Section 709(a) comes from the labels placed in the charters on the two forms of rental. The profit-sharing rental is labelled "Additional Charter Hire" (R. 10), the same as the phrase used by Section 709(a) in prescribing the 50 percent rental. On the other hand, the charters label the firm rental as "Basic Charter Hire." In contrast, Section 709(a) calls the rental not required by that section, *i.e.*, that based on Section 5(b), "the charter hire reserved in the charter" and Section 5(b) itself terms the rental, which the Commission may agree to under its authority, simply "charter hire." Thus, the charters give little basis for deciding whether the profit-sharing rental is based entirely on Section 709(a) or is based (at least in part) on Section 5(b).

If, as the contrary decisions and Eastern assert, the Commission's sole authority to agree to profit-sharing rentals of over 50 percent was derived from Section 5(b), it must be presumed that the contingent rate, insofar as it exceeded 50 percent, was

in fact based on that section and not Section 709(a). Surely, it cannot be assumed that the Commission intended to base a rate of 50 to 90 percent on a section explicitly providing authority for only a 50 percent rate. Any other conclusion would violate the long-established presumption of administrative regularity. *E.g., United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533; *United States* v. *Chemical Foundation*, 272 U.S. 1, 14–15. Moreover, the obvious intent of the parties was to have an overall rental consisting of a firm rental plus 50 to 90 percent of excess profits. Surely, there was no need, from the standpoint of the parties, to segregate the contingent rental required by Section 709(a) from that which the Commission determined to be necessary under Section 5(b). It is therefore fully consistent with the statute and the charters to say that both the firm and contingent rentals, at least insofar as they exceeded 50 percent, were based on Section 5(b).

3. Eastern argues (Br. 43–46) that, even if graduated profit-sharing were permissible, the portion in excess of 50 percent must be computed under Section 709 separately from, and before, the 50 percent portion. In other words, if the applicable rate were 90 percent, 40 percent of the profit is first computed, and this is added to 50 percent of the remaining profits. The result is less than the amount as obtained by the simultaneous computation of 90 percent of the total excess profits.

Eastern's contention is erroneous for two reasons. First, it is true that Section 709(a) first provides

for the "payment of the charter hire reserved in the charter" before requiring that the Commission include in contracts the provision for payment of 50 percent of excess profits. This does not mean that, when a 90 percent rate is provided by the charter, 40 percent must be computed as "charter hire reserved in the charter" with the other 50 percent computed afterwards as the statutory charter hire. The statute does not compel a division of the two elements of payment. Instead, as we have seen (pp. 21–26), it has been complied with when the charter requires the payment of at least 50 percent of excess profits. Here, the Commission and Eastern agreed to the payment of more than 50 percent of excess profits based on a sliding scale. They did not segregate the statutorily required amount from the additional payment. Eastern's contention, which is not compelled by statute, would reduce the payments due contrary to the explicit agreement of the parties.[16]

In any event, Eastern's argument is no longer an issue in this case. The trial court did not determine the proper method of computing the Commission's right to profit-sharing rentals. This was done in a stipulation to which the parties freely agreed (R. 136–137).

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[16] Eastern cites (Br. 44) government briefs in this and another case and the testimony of a government witness in this case to support its claim. The errors in this case were promptly corrected by the government (R. 120–135) and Eastern did not dispute the explanation.

C. THE COMMISSION'S STANDARD CHARTER EXPLICITLY PROVIDES FOR A PROFIT-SHARING RENTAL OF OVER 50 PERCENT, HAS BEEN CONSISTENTLY SO INTERPRETED BY THE COMMISSION, AND HAS BEEN APPROVED BY CONGRESS

The Maritime Commission, after serious study and consideration (see pp. 3–6 above), adopted the standard charter involved in this case, which explicitly provides for a profit-sharing rental of over 50 percent. The charter has been consistently interpreted by the Commission, as well as by charterers, to provide for such a rental. Thus, the Commission has interpreted its statutory authority to authorize rentals of over 50 percent of excess profits. It is well established that, when a statute is ambiguous—even assuming that Section 5(b) is—considerable weight must be given to the interpretation of the agency which administers it. *E.g., United States* v. *Zucca,* 351 U.S. 91, 96; *Kern River Co.* v. *United States,* 257 U.S. 147, 153–154.

The Commission's standard charter and uniform interpretation have been approved by Congress.[17] The allegedly illegal rate was published in the Federal Register on September 10, 1946. 11 Fed. Reg. 9936. More important, Congress was repeatedly given specific and detailed information concerning the Commission's practice. *Hearings Before the Subcommittee on Ship Sales, Charters, and Lay-ups, House Committee on Merchant Marine and Fisheries,* 80th Congress, 1st Sess. 176–179, 571–573, 591 (1947);

[17] The district court in *American Mail Line, Ltd.* v. *United States,* 213 F. Supp. 152 (W.D. Wash.), erred in suggesting the contrary.

Hearings on Sale, Charter and Operation of Vessels Before the House Committe on Merchant Marine and Fisheries, 81st Cong., 1st Sess. 57, 69, 91; (1949).

The first of these hearings occurred only nine months after the Maritime Commission adopted the "Form No. 303" charter which is involved in this case, when Congress was considering legislation to extend the Commission's chartering authority under the Merchant Marine Sales Act of 1946. Industry representatives were heard by the House Merchant Marine and Fisheries Committee, the profit-sharing rental provisions of the charter were thoroughly discussed, and no questions were raised as to the Commission's authority to apply that device in a form providing for rentals of over 50 percent of excess profits. *Hearings Before the Subcommittee on Ship Sales, Charters, and Lay-ups, House Committee on Merchant Marine and Fisheries,* 80th Cong., 1st Sess. (1947). On the basis of this hearing, extension of the chartering authority was then recommended by the Committee (H. Rep. No. 725, 80th Cong., 1st Sess. 2 (1947); S. Rep. No. 392, 80th Cong., 1st Sess. 3 (1947)):

> * * * with the understanding that the basic rates for the charter of dry-cargo vessels and recapture [profit-sharing rental] rates will be immediately increased, thus encouraging the purchase rather than charter of these ships.

Even if Congress had not been advised that the Commission was already collecting more than 50 percent of excess profits, these committee reports amounted to an express direction to do so. On the

basis of these reports, Congress agreed to extend the Commission's chartering authority. 61 Stat. 190.

With each of the several successive extensions of the Commission's chartering authority under the 1946 Act, Congress considered the profit-sharing rental and determined that its continued use was necessary to meet the objectives of the Act. Authority to charter was extended on the basis that (H. Rep. No. 60, 81st Cong., 1st Sess. 2 (1949); S. Rep. No. 55, 81st Cong., 1st Sess. 2 (1949)):

> It is contemplated that the Maritime Commission will continue to sell, charter, and operate ships in accordance with existing procedures and without any change in its present policy.

See also H. Rep. No. 564, 81st Cong., 1st Sess. 3 (1949); S. Rep. No. 483, 81st Cong., 1st Sess. 4 (1949). The "existing procedures" and "present policy" included, of course, the contingent rental here attacked by Eastern. Thus, Congress, on the basis of knowledge and consideration of profit-sharing rentals and the reasons for their use, directed their continuation.

III

IF EASTERN CAN AVOID PAYING THE CHARTER HIRE FIXED BY THE CONTRACTS, IT IS OBLIGATED UNDER THE DOCTRINE OF UNJUST ENRICHMENT TO PAY QUANTUM VALEBAT FOR USE OF THE GOVERNMENT'S VESSELS

Eastern alleges that the charters were invalid insofar as one of two complementary rental provisions required payment of contingent hire greater than 50 percent of excess profits. It claims that

it is therefore required to pay only the firm rental, plus the 50 percent of excess profit prescribed by Section 709(a). Thus, it asks in effect that the rental provisions be rewritten so as to create a smaller total rental than that agreed to by the parties. However, even if Eastern's attack on the legality of the charters were correct, rescission, not reformation, is the proper remedy. As the trial court observed (R. 23–24), if a rental provision in the charter was unauthorized, the remedy would be charter rescission and payment, *quantum valebat*, of the fair rental value of the vessels.

Reformation is inapplicable when, as here, there was no mutual mistake. *Moffett, Hodgkins & Clarke Co.* v. *Rochester,* 178 U.S. 373, 384–385; *Hearne* v. *Marine Insurance Company,* 20 Wall. 488, 491. If the Commission exceeded its statutory authority in agreeing to the rental in the charters, the government, no less than Eastern, may now repudiate that illegal action and rescind the contract. *Steele* v. *United States,* 113 U.S. 128, 133–134. In these circumstances the United States may recover from Eastern what was improperly granted—the value of the vessels' use. See *United States* v. *Wurts,* 303 U.S. 414, 416; *Wisconsin Central R. Co.* v. *United States,* 164 U.S. 190, 205, 210; Restatement, *Restitution* § 46(a). For the government has fully performed under the allegedly invalid agreement.

The rule which we urge is directly supported by opinions of this Court. In *Clark* v. *United States,* 95 U.S. 539, a vessel was lost while operated by gov-

ernment employees under an oral contract to pay daily charter hire of $150. The owner sued to recover both the value of the vessel and the agreed rental. The trial court dismissed the action because the contract violated a statute expressly requiring such contracts to be in writing. This Court agreed that the form of the contract violated the statute, but nevertheless held for the vessel owner (*id.* at 542–543):

> We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*.
>
> * * * * *
>
> Of course, the claimant is entitled to the value of the use of his vessel during the time it was in the hands of the government agents * * *.

Accord, *United States* v. *N.Y. & Porto Rico S.S. Co.*, 239 U.S. 88, 93; *United States* v. *Andrews*, 207 U.S. 229, 243; *St. Louis Hay & Grain Co.* v. *United States*, 191 U.S. 159, 164. See also Woodward, *Quasi Contracts* (1913), pp. 146–152, and the numerous cases cited therein.

While *Clark* dealt with a contract violating the statute of frauds—*i.e.*, with a contract bad as to form—the same principle of recovery for unjust enrichment has been applied by this Court to contracts which were in excess of the contractors' powers—*i.e.*, to *ultra vires* contracts. *Central Transp. Co.* v. *Pull-*

man's Car Co., 139 U.S. 24, 60; *Pullman's Car. Co.* v. *Transportation Co.*, 171 U.S. 138, 151. See also Woodward, *supra*, pp. 250–255. The rule applied in such cases is illustrated by *Hitchcock* v. *Galveston*, 96 U.S. 341, 350–351:

> It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful.
>
> Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform.

See also *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, 566, note 22; *Willard Co.* v. *United States*, 262 U.S. 489, 494; *Crocker* v. *United States*, 240 U.S. 74, 81; *Parkersburg* v. *Brown*, 106 U.S. 487, 503.

Eastern contends that the Commission would not have chartered at a higher firm rental if it had known that the contingent rental of from 50 to 90 percent was not authorized. However, the fact that the total rate set by the Commission was greater than the firm rate plus 50 percent of excess profits strongly suggests that the Commission would have chartered at a higher firm rental had it known that the higher contingent rental was unauthorized. Moreover, as

we have seen (p. 32), Congressional committees directed the Commission to charge more, not less, rental.[18]

Eastern further argues (Br. 36) that a higher firm rate would have permitted it to charge higher voyage charter rates to government agencies. But all of Eastern's voyage charters (not just the two it obtained from the government (R. 241)) were necessarily negotiated after the rates here complained of had been included in Eastern's contracts. The voyage charter terms therefore reflected the rental Eastern had already agreed to pay the Commission, not the lesser rental Eastern now seeks.

If this Court rejects the government's position that the contingent rentals provided in the charters are valid (see pp. 16–33 above) but agrees that Eastern is responsible for payment on a theory of unjust enrichment, a determination would have to be made of the vessels' fair rental value. In *Clark* v. *United States*, 95 U.S. 539, 543, this Court itself determined that the rental agreed by the parties in an invalid contract was the proper measure for recovery based on unjust enrichment. On the other hand, the Court might deem it appropriate to remand this issue to the

[18] The Commission's decision not to increase the firm rate because of protests from other government agencies (see Pet. Br. 36–37, notes 41, 42) is not relevant to this case. That was in 1947 and 1948, long after the Commission had agreed to the rental here complained of. The Commission decided not to charge a higher firm rental in 1946 because of solicitude for prospective charterers. See p. 5, note 4 above.

district court for initial decision.[19] On remand, the world market rate for similar vessels might be regarded as the proper measure of Eastern's unjust enrichment. See *Costanzo Coal Min. Co.* v. *Weirton Steel Co.*, 150 F. 2d 929, 936 (C.A. 4), certiorari denied, 326 U.S. 765. Or that the contract rate agreed to by the parties might be deemed (see R. 23–24) to estop the government from obtaining the still higher world market rate. In any event, the rate agreed to by the parties would be strong evidence of the proper measure of the government's damages. *Clark* v. *United States, supra;* Restatement, *Contracts* § 347.

IV

THE NEW CHARTER SUBSTITUTED FOR THE ORIGINAL CHARTERS DID NOT VIOLATE THE MERCHANT MARINE ACT

In 1947, Eastern and the Commission agreed to an addendum to the original charters—the so-called "Foreign Trade Addendum"—which was in actuality a substitute for the original charters, effective as of September 1, 1947. The new charter changed the earlier agreement in several important respects: (1) it pro-

[19] If the district court decided not to use the rate agreed to by the Commission in the charter it would seem proper, under the doctrine of primary jurisdiction for the court to hold further proceedings in abeyance to permit the Commission an opportunity to determine such rates, for Section 5(b) of the 1946 Act provides that rates are to be "fixed by the Commission." See *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 498–499; *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 62–70; *Farrell Lines, Inc.* v. *United States*, 308 F. 2d 582 (Ct. Cls.).

hibited either party from terminating the new contract prior to November 1, 1947; (2) it "cut-off" accounting for the profit-sharing rental as of September 1, 1947, and started a new accounting for profit-sharing rental with respect to all voyages commenced after the date; (3) it liberalized the old contract's definition of "net voyage profit"; and (4) it further defined "vessel lay-up expenses." Eastern does not object to all the new terms of the substituted agreement, but complains only of the provision starting a new accounting period for computing the profit-sharing rental. This attempt to retain those terms financially favorable to Eastern, but to attack the single provision which favored the government, is without merit.

A. THE RECORD SHOWS THAT THE COMMISSION WAS ACTING PURSUANT TO THE ORIGINAL CHARTERS IN ITS ACTIONS LEADING TO THE NEW AGREEMENT

Although the primary policy of the Merchant Ship Sales Act of 1946 was to sell, not charter, government vessels (see p. 18 above), chartering proved enormously profitable to most private operators, presumably because of an early post-war trend toward high freight rates. As a result, the number of vessels chartered by the government increased from 734 in August 1946 to 1,510 in June 1947 (R. 159). As was noted in *American President Lines, Ltd.* v. *United States*, 2[illegible] F. 2d 552, 553 (C.A. 3), "No prudent business man would purchase a commodity which could be leased at a comparatively more favorable price."

Observing that increased chartering was militating "against the accomplishment of the objectives of the

Ship Sales Act of selling war-built merchant ships," Congress directed that chartering rates be increased to encourage "the purchase rather than charter of these ships." S. Rep. No. 392, 80th Cong., 1st Sess. 2–3 (1947); H. Rep. No. 725, 80th Cong., 1st Sess. 2 (1947). Private owners and charterers then made conflicting recommendations to the Commission. The charterers opposed increased rates on the ground that a downward market trend was developing; the owners favored outright termination of all charters to preserve their ships from destructive competition (R. 159–163).

Considering all these factors, the Commission decided to exercise its right of charter termination, which was reserved to both parties in Clause 14 of the "Form No. 303" charter (R. 184). On August 15, 1947, it advised Eastern and the other charterers that their contracts were being terminated, but that the terms and conditions of new charters—with new accounting periods—would be announced. The charterers immediately protested; return of the vessels threatened the loss of lucrative voyage charters (R. 161, 164). They insisted that the Commission not require redelivery of the vessels, but permit continued chartering under substitute agreements (R. 164–165). This the Commission finally agreed to do.

On August 20, 1947, the Commission advised the charterers of a proposed substitute agreement (the "Foreign Trade Addendum") which the charterers could accept in lieu of outright termination (R. 234–236). Acceptance could cover all, or any lesser num-

ber of, the vessels then under charter, but as to vessels not included in a substitute agreement the original termination notice remained effective (R. 238). Eastern promptly accepted the Commission's offer without reservation (R. 237), and executed a substitute agreement (R. 198–201). No objection was made by Eastern until its libel was filed in this case some seven years later (R. 179).

Eastern contends (Br. 56) that the Commission coerced it into accepting the substitute charter. This is true only in the sense that the Commission stated that the charter would otherwise be terminated. Eastern, however, had agreed in the original charters that either party could terminate the charters on 15 days' notice. The government, in other words, proposed to do no more than exercise its reserved right.

Eastern also claims (Br. 49) that starting a new accounting period for the profit-sharing rental was designed by the Commission to prevent charterers from offsetting losses incurred during the rest of the year from previous excess profits. But the purpose of the termination clause was obviously to allow either party to terminate whenever it deemed it advantageous. The Commission decided to terminate unless Eastern and the other charterers would agree to new charters which would be just as profitable to the Commission as termination followed by rechartering. When the Commission did this, it was merely exercising a right to which Eastern had agreed. Contrary to Eastern's suggestion (R. 56), it was not violating either the letter or spirit of any law.

Eastern of course had a choice at the time it agreed to the new charters. First, it could have accepted the notice of termination and returned the vessels to the government. This action would have relieved it of any further obligation to pay rental to the Commission. Moreover, Eastern's subcharters with others provided for cancellation without liability in the event that the Commission terminated the charters. Second, Eastern had the option of retaining the government's vessels under the terms of the substitute agreement.

Eastern's selection of the second alternative—acceptance of the substitute agreement—was an everyday business decision. It presumably anticipated profits from that decision or it would not have made it. That future events proved disappointing provides no basis for ignoring the contract.

Eastern also claims (Br. 49) that "Maritime was not seeking a bona fide termination of the charters." This statement, however, is refuted by the record. Many charterers, unlike Eastern, decided not to agree to the substitute offer. Consequently, as a result of the Commission's termination of the original charters, 172 vessels were redelivered (R. 167). Eastern is in effect complaining that the Commission did not demand a complete termination of Eastern's charters and redelivery of the vessels before it agreed to the substitute charter. The Commission, however, pursued the course it did in order to save Eastern and other charterers the cost of redelivery and the loss of what they then considered profitable voyage charters.

(R. 164). Obviously, the procedure has no vice, and the fact is that Eastern joined in suggesting that the Commission follow it (R. 163).

B. THE ADDENDUM DID NOT VIOLATE THE REQUIREMENT OF SECTION 709(a) AS TO CALENDAR-YEAR ACCOUNTING

The new agreements provided for the computation of the profit-sharing rental separately from the computation of the same rental under the old charters. The result was to split the year 1947 for this purpose. Eastern argues (Br. 50–57) that the substitute agreement therefore violated the requirement of Section 709(a) of the Merchant Marine Act of 1936 for calendar-year accounting.

Section 709(a) is in terms limited to voyages performed under a single charter. Eastern ignores the fact that the substitute agreement was a new charter distinct from the original contract. This is shown by the language agreed to by the parties in the substitute agreement itself (R. 199):

> [T]his addendum * * * shall be treated for accounting purposes as if it constituted a separate charter between the parties.

At the least, the addendum constituted a new charter for purposes of computing the profit-sharing rental. The language of Section 709(a), upon which Eastern relies, is therefore inapplicable.

In addition, we have seen above (pp. 21–29) that Section 709(a) merely establishes a minimum rental of 50 percent of excess profits—computed on the basis of a calendar year—and that Section 5(b) confers on the Commission authority to provide for a higher profit-

sharing rental. Section 709(a) thus was designed to protect the government by requiring a minimum rental; it conferred no rights on charterers against the government. Consequently, even if the new charter were not separate from the old, the Commission had authority to agree to a single charter dividing a calendar year into two parts for accounting purposes.

The only statutory limitation is that the result must afford the government 50 or more percent of excess profits on a calendar-year basis. As Eastern emphasizes, the effect of dividing 1947 into two parts was to increase considerably the profit-sharing above 50 percent of excess profits for the year. The new charter therefore satisfied the statutory mandate.[20]

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[20] Eastern cites (Br. 51–53) the legislative history of the Merchant Marine Act of 1936 and a 1938 amendment to it as showing the intent of Congress to require the Commission to compute profit-sharing on a calendar-year basis. However, this history relates to subsidy recapture provisions, not to profit-sharing rentals. It shows that Congress provided for computation of subsidies on a five-year and ten-year basis, respectively, under the two acts because it did not want subsidies to depend on year-to-year fluctuations in earnings. In contrast, Section 709(a) of the 1936 Act provides for calendar-year accounting and has no legislative history underlying it which even suggests that the Commission could not contractually provide for a different accounting period.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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JANUARY 1964.

APPENDIX

The Merchant Ship Sales Act of 1946, 60 Stat. 41, as amended, 50 U.S.C. App. 1735–1746, provides in pertinent part as follows:

SEC. 5 [50 U.S.C. App. 1738]. (a) Any citizen of the United States and, until July 4, 1946, any citizen of the Commonwealth of the Philippines, may make application to the Commission to charter a war-built dry-cargo vessel, under the jurisdiction and control of the Commission, for bare-boat use. The Commission may, in its discretion, either reject or approve the application, but shall not so approve unless in its opinion the chartering of such vessel to the applicant would be consistent with the policies of this Act. No vessel shall be chartered under this section until sixty days after publication of the applicable prewar domestic cost in the Federal Register under subsection 3(c) of this Act.

(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rates for similar vessels for

similar use as determined by the Commission.

(c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section.

* * * * *

SEC. 7 [50 U.S.C. App. 1740]. (a) In exercising its powers under this Act and under other provisions of law with respect to the sale and charter of war-built vessels, the Commission shall give preference to citizen applicants over noncitizen applicants, and as between citizen applicants to purchase and citizen applicants to charter, shall, so far as practicable and consistent with the policies of this Act, give preference to citizen applicants to purchase. In determining the order of preference between citizen applicants to purchase or between citi- applicants to charter, the Commission shall consider, among other relevant factors, the extent to which losses and requisitions of the applicant's prewar tonnage have been overcome and shall in all cases, in the sale and charter of a war-built vessel, give preference in such sale or charter, as the case may be, to the former owner of such vessel, or to the person for whom the vessel was constructed but to whom delivery thereof was prevented by the United States. In determining the order of preference between noncitizen applicants to purchase, the Commission shall give preference to citizens of the Commonwealth of the Philippines, and in determining the order of preference between other noncitizen applicants to purchase shall consider the extent to which losses in prewar tonnage of the various member nations of the United Nations, incurred in the interests of the war effort, have been overcome, and the relative effects of such losses upon the national economy of such member nations.

* * * * *

SEC. 12 [50 U.S.C. App. 1745]. (d) All moneys received by the Commission under this Act shall be deposited in the Treasury to the credit of miscellaneous receipts. The provisions of sections 201(d), 204(b), 207, 209(a), and 905(c) of the Merchant Marine Act, 1936, as amended, shall apply to all activities and functions which the Commission is authorized to perform under this Act.

The Merchant Marine Act, 1936, 49 Stat. 1985, as amended, 46 U.S.C. 1101–1294, provides in pertinent part as follows:

SEC. 207 [46 U.S.C. 1117]. The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. All the Commission's financial transactions shall be audited in the General Accounting Office according to approved commercial practice as provided in the Act of March 20, 1922 (42 Stat. 444): *Provided,* That it shall be recognized that, because of the business activities authorized by this Act, the accounting officers shall allow credit for all expenditures shown to be necessary because of the nature of such authorized activities, notwithstanding any existing statutory provision to the contrary. The Comptroller General shall report annually or oftener to Congress any departure by the Commission from the provisions of this Act.

* * * * *

SEC. 709 [46 U.S.C. 1199]. (a) Every charter made by the Commission pursuant to the pro-

visions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charter's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

* * * * * *

SEC. 713 [46 U.S.C. 1203]. In the awarding of charters, the Commission shall take in consideration the charterer's financial resources and credit standing, practical experience in the operation of vessels, and any other factors that would be considered by a prudent businessman in entering into a transaction involving a large investment of his capital; and the Commission is directed to refrain from chartering its vessels to any person appearing to lack sufficient capital, credit, and experience to operate successfully the vessel over the period covered by the charter.

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Supreme Court of the United States

OCTOBER TERM, 1963

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, *Petitioners*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 137

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, *Petitioners*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONERS

I. WAIVER OR ESTOPPEL

When the Maritime Commission proposed to collect profit sharing percentages in excess of 50 percent, all industry associations, including one of which Eastern was a member, protested the sliding scale charge to the extent that it exceeded the 50 percent specified in sec-

tion 709(a).[1] As a result of these protests, Maritime amended clause 13 to add the preliminary payment language, and issued regulations and instructions unqualifiedly reserving the charterers' rights to dispute the legality of any of the charter provisions, including the sliding scale.[2]

One of the indicia of acquiescence relied upon by the Government (Govt. Br. 6) is that Eastern filed its accountings for additional charter hire showing computations at the sliding scale rates.[3] But these account-

[1] The Government has overlooked its own affidavits in stating (Govt. Br. 7, ftn. 5) that "nothing in the record shows that Eastern was a member of these [steamship] associations, ever subscribed to that view, or made any protest whatsoever until February 15, 1955 . . ." The fact is that Eastern was a member of the American Merchant Marine Institute, which protested on August 15, 1946 (East. Br. 38-39, ftn. 43). Government affiant Bouldin (R. 175) mentions the American Merchant Marine Institute, *"to which Eastern Gas belonged."* (Emphasis added.) Thus, Eastern is directly identified in the record with the protests made in August 1946 before the charters were signed.

[2] See the material cited by Eastern (East. Br. 38-39, ftns. 43-45), as well as the decision in *American-Foreign Steamship Corp.* v. *United States*, 291 F. 2d 598, 603, 613-15 (2d Cir.), *cert. denied*, 368 U.S. 895 (1961). The purpose of the clause 13 reservation was there confirmed by government counsel. It is discussed in the decisions in *American Mail Line, Ltd.* v. *United States*, 213 F. Supp. 152, 156-57 (W.D. Wash. 1962), and *American President Lines, Ltd.* v. *United States* (N.D. Cal.—Oct. 10, 1963; East. App. A, pp. A9-10).

[3] When the charters were signed it was not known whether they would result in profits to be shared; hence, there was no occasion to litigate at that time. Some charterers sustained losses or did not make sufficient profits to require payments of additional charter hire in excess of 50 percent. Of the approximately ninety companies who chartered vessels, only thirty have filed claims to recover sliding scale amounts.

ings were required to be submitted in this form by clause 28 of the charters. (See standard charter form, 46 C.F.R. § 299.130, c. 28.). The Government's contention was squarely presented and rejected in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866 (4th Cir. 1962), *cert. denied*, 372 U.S. 944 (1963).

The cases cited by the Government (Govt. Br. 14, 15) are not in point. To the extent that any of them involve contracts at all,[4] they hold only that the contracts are binding where no statute prescribes conflicting terms or a conflicting policy. In the present case, the statute (section 709(a)) prescribes the precise formula for additional charter hire that must be included in the contract. If the parties had attempted to depart from this formula, their attempt would have to be disregarded and the statute enforced according to its terms.[5] "Estoppel could not become the means of successfully avoiding the requirement of the act. . . ." *Pittsburgh, C., C. & St. L. R. Co.* v. *Fink*, 250 U.S. 577, 583 (1919). *Accord: New York Cent. & H. R.R. Co.* v. *York & Whitney Co.*, 256 U.S. 406 (1921); *Louisville & N. R. Co.* v. *Central Iron & C. Co.*, 265 U.S. 59, 65 (1924); *Illinois Steel Co.* v. *Baltimore & Ohio R. Co.*, 320 U.S. 508, 531 (1944); *Wilko* v. *Swan*, 346 U.S. 969 (1953); *Hoffman* v. *Gleason*, 107 F. 2d 101, 104 (6th Cir. 1940).

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[4] Cases such as *Callanan Road Improv. Co.* v. *United States*, 345 U.S. 507 (1953), and *Commissioner* v. *National Lead Co.*, 230 F. 2d 161 (2d Cir. 1956), *aff'd*, 352 U.S. 313 (1957), did not involve contracts but administrative licenses.

[5] *Matson Navigation Co.* v. *United States*, 284 U.S. 352 (1932), involved a statutory requirement for "just compensation." That concept is far from a prescribed formula, and in any event the contract there involved a settlement of the amount—an accord and satisfaction. No such settlement of a doubtful quantity is involved in this case.

The waiver or estoppel issue was not mentioned in the petition for certiorari or in the Government's memorandum filed in response thereto, and it was therefore not discussed in Eastern's brief. There is no conflict of authority on the point. It has been uniformly rejected. The relevant decisions may be found in Eastern's opening brief (East. Br. 18 and 25).

II. SLIDING SCALE OF PROFIT SHARING

The Government admits (Govt. Br. 26-27) that section 709(a) does not authorize profit sharing in excess of 50 percent. It contends, however, that section 5(b) does confer this authority and it is immaterial that Maritime may have relied upon section 709(a) in making the excess charge. Section 709(a) is thus construed by the Government to fix a minimum formula only.

Under this interpretation, section 709(a) may be so rewritten by Maritime, for purposes of both the 1936 and 1946 Acts, as to become meaningless. If section 709(a) fixes only a minimum, then section 5(b) (and the parallel section 714 of the 1936 Act (46 U.S.C. § 1204)) may be interpreted to justify exaction of 100 percent of profits, to eliminate the 10 percent return on capital to be retained by the charterer if earned; and to eliminate any cumulation or offsetting of profits or losses over the period of the charter. If Congress meant to grant such broad discretion, there would have been no need to establish a profit sharing formula.

Clearly, the Government's position is based upon a partial reading of section 5. While the first sentence of subsection (b) of that section confers some discretion, stating, in part, that Maritime may fix additional charter hire "at such rate as the Commission deter-

mines to be consistent with the policies of this Act, . . ." the next word in that sentence is *"but."* Thereafter follow the limitations imposed by Congress on that discretion. The Government recognizes only two of these limitations—the first being the 15 percent floor; and the second, the world market charter rate floor, if four members of the Commission concur. It ignores the third limitation—the profit sharing provision—which is stated as a directive to Maritime. That limitation is as much a part of the statute as the first two. The fact that Maritime might have fixed a basic rate of hire in excess of 15 percent under section 5(b) is not a valid basis for ignoring the profit sharing formula set by section 5(c). As was pointed out by Eastern (East. Br. 36-37), the impact of an increase in basic hire would have fallen on the Government, whereas an increase in profit sharing would fall only on the charterers.

In support of its argument as to section 5(b), the Government (Govt. Br. 24) cites the opinion of the Third Circuit in *American President Lines, Ltd.* v. *United States*, 265 F. 2d 552 (1959), *affirming* 162 F. Supp. 732 (D. Del. 1958). In that case the charters contained the 50 percent profit formula of section 709 (a), not the sliding scale. The only question was the computation of the vessel price upon which the amount of basic charter hire should be computed. In one of the charters the basic hire was 8½ percent of the statutory sales price, and in another, 5 percent, with 3½ percent additional if earned. The extract from that case (Govt. Br. 24) refers only to basic hire, and not, as the Government implies, to additional charter hire, with which the present case is concerned. This decision emphasizes, as does the later *American President*

Lines case (East. App. A, p. A7), that the only effective way to discourage chartering would be to raise the basic hire, which Maritime did not wish to do because government agencies objected.

The Government suggests (Govt. Br. 28-29) that the 25 and 40 percent excess portions of additional charter hire were necessarily charged under section 5(b), rather than section 709(a), because there is nothing in the record to show reliance upon 709(a) in assessing the charge. It relies upon a "presumption of administrative regularity," saying that Eastern has not sustained the burden of rebutting this presumption.

In contrast to the Government's reliance upon presumption are: (a) the written records of Maritime (East. Br. 37, ftn. 42) showing that Maritime acted under section 709(a); (b) the regulations and contract provisions appearing on the foldout sheet to that brief; (c) the finding of the Court of Claims in *American Export,* 290 F. 2d 925, 931, that the Government's contention that the sliding scale was charged under section 5(b) was an "afterthought"; and (d) the rejection of the claim in *Dichmann, Wright & Pugh,* 144 F. Supp. 922, 925, and in *American Mail Line,* 213 F. Supp. 152, 163 (after a trial).

The Government suggests (Govt. Br. 24) that the world market charter rate was 45.6 percent of the statutory sales price in August 1946. This figure appears in the McDaniel affidavit (R. 151), and is in turn based upon a formula prepared by another staff member who did not submit an affidavit. There is no evidence that this figure was ever submitted to the Maritime Commission, and memoranda actually considered when the 15 percent rate was selected show that the Commission would not have regarded this spot rate to be ma-

terial because declines were expected shortly in world rates, the subcharter and freight rates were controlled through government monopoly and by regulation, and some vessels would not justify a rate even of 15 percent (East. Br. 34-36, ftns. 36-40).[6] Indeed, in view of the Government's monopoly, it is doubtful whether the concept of a world market rate is meaningful.

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[6] Exhibits introduced by government affiant McDaniel in *Smith-Johnson Steamship Corp.* v. *United States*, 142 F. Supp. 367 (Ct. Cl. 1956) show:

> "Foreign ships are being offered in the American market at time charter rates which work out much lower than the corresponding rates under the proposed bareboat basis of 15% of the value appearing in the schedules given out by the USMC. Some of the operators stated clearly that such charters of foreign ships were an inducement, since there were no trading restrictions, no recapture of profits, and a limitation of risks. (From p. 5 of notes of meeting with industry on February 6, 1946.)
>
> . . . . . .
>
> Under the terms of the Ship Sales Bill, charter rates are to be not less than 15 percent of adjusted statutory sales price, except upon the affirmative vote of four Commissioners. These terms would result in a rate per deadweight ton per month for a Liberty ship of from 61 cents to 74 cents, depending on the age of the vessel. American charterers are subject, furthermore, to the recapture provisions of the Merchant Marine Act of 1936. It appears evident from an examination of British and American charter rates on 10,000 ton tramps, that American operators might well be under considerable competitive disadvantage unless the Commission were to determine to lower minimum rates as provided for in the Ship Sales Bill. (Memorandum dated February 12, 1946, from Division of Vessel Disposal to Maritime Commission, p. 6.)
>
> . . . . . .
>
> Certain indications received by this Division, including the charter terms of the British ship disposal program, would indi-

III. THE "CHARTER HIRE RESERVED" ACCOUNTING PROBLEM

It was pointed out by Eastern (East. Br. 43-46) that less additional charter hire would be payable if the sliding scale is to be justified by reliance upon section 5(b) rather than section 709(a). The reduction is described in the opening brief (East. Br. 43-46) and in the supplemental affidavit of Robert A. Caswell (R. 40-43). Since, under the Government's theory, the only purported source of authority for the excess profit sharing percentages is section 5(b), it necessarily follows that these portions must be regarded as "charter hire reserved in the charter" within the meaning of section 709(a). It seems to concede (Govt. Br. 29-30), as contended by Eastern, that if these excess portions were lawfully exacted as "charter hire reserved," they must be deducted from profits first before computing the additional charter hire due at the 50 percent rate. But it fails to explain the statutory or contractual basis for the conversion by its affiant (R. 134) of the 25 and 40-percent excess portions mentioned in the charter to 50 and 80 percent, respectively, which becomes necessary to justify the collection by the Government of the amount it claims under the charter.

In an effort to avoid the force of Eastern's argument concerning "charter hire reserved," the Govern-

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cate that the world market rate may be below 15 percent of the statutory sales price of comparable vessels. There is also the possibility that foreign interests may purchase vessels from the Commission and subsequently charter them for less than 15 percent of the statutory sales price. This would appear to jeopardize the competitive position of American charterers. (Memorandum from Division of Vessel Disposal, approved by Maritime Commission May 31, 1946.)

ment asserts (Govt. Br. 30) that Eastern eliminated this issue from the case when it stipulated that the judgment on the Government's second cause of action (sliding scale) should be $64,000. The Government has misrepresented the effect of the stipulation. After the court below had found all issues against Eastern, including the "charter hire reserved" issue (R. 20-21), which affected the amount due on the sliding scale cause of action, the damages were agreed upon to simplify the entry of judgment and the appeal. The stipulation (R. 136) states specifically that it is:

> without prejudice to the right of libelant-cross-respondent Massachusetts Trustees of Eastern Gas and Fuel Associates . . . to appeal from any judgment . . . awarding damages to respondent-cross-libelant [the Government] on the latter's second separate cause of action [sliding scale], . . .

Eastern stipulated only the amount to which the Government would be entitled under the rationale of the decision of the district court which rejected the position of Eastern.

IV. POSTENACTMENT COMMENT OF CONGRESSIONAL COMMITTEES AND CONSISTENT ADMINISTRATIVE PRACTICE

The Government asserts (Govt. Br. 31) that postenactment congressional committees knew about the sliding scale when the chartering authority was extended, and thus the lawful charge has legislative sanction and direction, notwithstanding section 709(a). This argument was specifically rejected in *Dichmann, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922, 926 (S.D.N.Y. 1956), and in *American Mail Line, Ltd.* v. *United States*, 213 F. Supp. 152, 163-64 (W.D.

Wash. 1962). The argument has been advanced in all lower courts by the Government and none has accepted it.

The argument has no merit because an erroneous administrative interpretation is not deemed to be ratified by reason of reenactment of legislation. In *Biddle* v. *Com. of Internal Revenue*, 302 U.S. 573, 582 (1938), Mr. Justice Stone said:

> Where the law is plain the subsequent reenactment of a statute does not constitute adoption of its administrative construction. . . .

And in *Manual Enterprises* v. *Day*, 370 U.S. 478, 518 (1962), the concurring opinion of Justice Brennan, joined by Chief Justice Warren and Justice Douglas, stated:

> But, in any event, testimony before [congressional] committees, committee reports, and administrative usurpation, do not, either singly or collectively, suffice to establish authorization.

In *United States* v. *Philadelphia Nat. Bank*, 374 U.S. 321, 348-49 (1963), the Court, quoting from an earlier case, said:

> "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one. . . ."

See also *Federal Com. Commission* v. *Columbia B. System*, 311 U.S. 132, 137 (1940); *United States* v. *Missouri P. R. Co.*, 278 U.S. 269 (1929); and *American President Lines, Ltd.* v. *United States*, 291 F. 2d 931, 936 (Ct. Cl. 1961), where the court rejected the argument that congressional committee pressure may be re-

lied upon as authorization for unfair or discriminatory action under the Maritime statutes.

In this case, the Chairman of the House Merchant Marine Subcommittee, who exercised an important influence over the contents of the postenactment congressional reports cited by the Government, was opposed to the chartering program of the 1946 Act, believing in direct government operation of the vessels.[7] He was openly unsympathetic with the plan of the 1946 Act, which was to take the Government out of the shipping business and return the industry to the hands of private operators.[8]

With its argument concerning congressional ratification, the Government says (Govt. Br. 31) that the Commission has consistently interpreted its statutory authority to authorize rentals of over 50 percent of excess profits, and that considerable weight should be given to this interpretation. In this connection, it should be pointed out that in January 1957, four

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[7] Hearings before the Subcommittee on Ship Sales, Charters, and Lay-Ups of the House Committee on Merchant Marine and Fisheries (80th Cong., 1st Sess., June 11, 1947, p. 646).

[8] The Government misreads the legislative history and other background material in stating (Govt. Br. 3), that the WSA chartering program was "designed as an experiment, to test the rate suitable for chartering (R. 44-45)." For this statement, it relies upon a Maritime Commission staff memorandum dealing with chartering, dated August 7, 1946, and implies that the WSA charters were to test the rate of charter hire to be used in the later Form 303 charters. The staff memorandum (R. 45) actually says something completely different:

> The original charter plan was of an experimental nature *to test the rate at which the government could get out of business*, . . . (Emphasis added)

months after the decision in *Dichmann, supra*, holding the sliding scale illegal, Maritime eliminated the sliding scale provision from clause 13 of its standard charter, which now reads:

> CLAUSE 13. *Statutory additional charter hire.* The parties mutually agree that, in addition to the charter hire required under Clause 12, Part II, of the Agreement, as amended, the Charterer shall pay over to the Owner *such statutory additional charter hire as may be required by the provisions of section 709 of the Merchant Marine Act, 1936, as amended.* The time of payment shall be as provided by regulations of the Owner. (Emphasis added.) (22 F.R. 609, Jan. 30, 1957; now codified in 46 C.F.R. § 299.130, revised Jan. 1, 1958, p. 578.)

It is also difficult to reconcile the consistent administrative interpretation argument with Maritime's "mandatory" regulation, which has been in effect since 1946, stating that every charter must contain provisions identical with section 709(a). See 46 C.F.R. § 299.31(g), quoted on the foldout sheet to Eastern's opening brief.

V. QUANTUM VALEBAT

The Government urges (Govt. Br. 33-38) that if this Court should find the sliding scale portions of hire to be in violation of statute, then the charter must be rescinded and the Government permitted to recover on a *quantum valebat* basis.

As pointed out above in the discussion of waiver or estoppel, the charterers protested and obtained a reservation of rights with respect to payments of additional charter hire, including amounts paid at the sliding scale rates. If they are correct that the amounts in

excess of 50 percent were in violation of the statutes, then they are entitled to a return of the amounts overpaid. There is no basis for a rescission of the charter. The amounts returnable are in all cases ascertainable from the accountings.

The courts have uniformly held, in dealing both with the charter and the sales provisions of the 1946 Act, that the statutory terms are substituted for the unlawful contract terms, and this rule applies even in the absence of an express reservation. There is no conflict of authority on this issue. See the cases cited in the opening brief (East. Br. 18 and 25), and Maritime's regulation quoted on the foldout sheet thereto (46 C.F.R. § 299.56(b)(5)), to the effect that the statute shall prevail over inconsistent contract terms.

Clark v. *United States*, 95 U.S. 539 (1877), relied upon by the Government, is obviously not in point. There, the entire contract violated the statute of frauds and was not enforceable.[9] Here, part of one clause of the charter conflicts with a statute and the rights of the parties concerning its legality were reserved. Section 709(a) prescribes the profit sharing provision that should have been in the charter. Accordingly, there is

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[9] The other cases cited by the Government similarly deal with contracts which, because of the statute of frauds, lack of corporate authority, lack of mutuality, etc., were claimed to be invalid or unenforceable in their entirety. Moreover, in two of the cases cited by the Government, the courts merely declared invalid a part of the contract but enforced the rest of it. *Hitchcock* v. *Galveston*, 96 U.S. 341 (1878); *Steele* v. *United States*, 113 U.S. 128 (1885).

no basis for remanding the matter to the present Maritime Administration for further action.

The *quantum valebat* concept is based upon the theory that, as a result of fraud, mistake or undue advantage taken, something of value has been received in circumstances constituting unjust enrichment. *F. E. Grauwiller Transportation Co.* v. *King*, 131 F. Supp. 630, 634 (E.D.N.Y. 1955), *aff'd*, 229 F. 2d 153 (2d Cir. 1956). None of these elements is presented here. There can be no unjust enrichment where the charterers pay the precise additional charter hire prescribed by Congress. If Maritime had no authority to collect profit sharing in excess of 50 percent by contract, it may not avoid the statutory requirement and accomplish the same result in the guise of *quantum valebat*.

VI. SPLIT ACCOUNTING IN 1947

The Government's position on this point is twofold. First, it contends (Govt. Br. 43) that the amendment to the original charter created an entirely new charter for purposes of section 709(a), and that the calendar year accounting requirement of that section is limited to voyages performed under a single charter. Alternatively, even if the amendment did not create a new charter, it contends (Govt. Br. 44) that Maritime could properly exercise the threat of termination in order to exact more onerous terms from the industry in respect of accounting requirements (just as it was authorized to increase the profit sharing percentage) because section 709(a) was intended to fix minimum terms for the benefit of the Government.

There is no basic dispute as to the facts. The only question is whether the substance of the transaction

was a continuation of the old charter and, if so, whether section 709(a) afforded any protection to the charterers.

The steamship industry was obviously subjected to economic duress when the purported notice of termination was issued. It was attempting to develop post-war trade routes which had been thoroughly disrupted during World War II. It had cultivated shippers, established a recurring pattern of cargo movements, and in other ways sought to reestablish the private United States merchant marine both with owned and chartered vessels. Admittedly, the United States had a monopoly of vessels available for charter, and the abrupt termination of the charters presented the companies who relied upon chartered vessels to rebuild their trade, with the option of breaking preexisting commitments for the vessels, disrupting their trade, and going out of business, or, in the alternative, of accepting Maritime's terms.

Where the only object and the only legal effect of the so-called new charter were to change the statutory accounting period, the new charter should be treated as a fiction and disregarded. Courts have uniformly condemned action by government agencies in imposing, as a condition to participation in governmental programs, the acceptance of unlawful conditions. As was said in *Shay* v. *Agricultural Stab. & Conserv. State Com. for Ariz.*, 299 F. 2d 516, 522 (9th Cir. 1962):

> To permit any such result [giving effect to an unlawful regulation because it was incorporated into a contract], in a contract of adhesion of this type, when the plaintiffs' only real alternatives were to sign it as printed or stay out of the program, would be to punch a hole as wide as a barn

door in the restrictions imposed by the Congress upon the authority of the Secretary.

The foregoing is consistent with a long line of similar cases.[10]

There is no substance to the argument of the Government (Govt. Br. 38-39) that the Foreign Trade Addendum changed the charter terms in any respect favorable to the charterers. The provision prohibiting redelivery until November 1, 1947, was prejudicial to the charterers. The so-called liberalization of the definition of "net voyage profit" in the Foreign Trade Addendum was merely a recognition of the customary accounting practice, theretofore consistently accepted by Maritime, of treating reserves for repairs and insurance as expense, subject to later adjustment on the basis of actual cost. The standard accounting regulations make such a provision applicable to all charters. (46 C.F.R. §§ 299.35(a), 299.36(a), 299.204(9).) The definition of "vessel lay-up expenses" (R. 200) applied only to vessels redelivered after August 15, 1947, and later rechartered. It was a provision more burdensome to charterers than that existing in the original charters.

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[10] See *Brannan* v. *Stark*, 342 U.S. 451 (1952); *Glavey* v. *United States*, 182 U.S. 595 (1901); *International Ry. Co.* v. *Davidson*, 257 U.S. 506 (1922); *MacMath* v. *United States*, 248 U.S. 151 (1918); *United States* v. *Andrews*, 240 U.S. 90 (1916); *United States* v. *Laughlin*, 249 U.S. 440 (1919); *Work* v. *United States ex rel. McAlester-Edwards C. Co.*, 262 U.S. 200 (1923); *Peoples Bank* v. *Eccles*, 161 F. 2d 636, 644 (D.C. Cir. 1947); *rev'd on other grounds*, 333 U.S. 426 (1948); *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1962).

VII. CONCLUSION

Accordingly, petitioners respectfully request this Court to make the determinations set forth at pages 57-58 of their opening brief, to reverse the judgment below, and to remand the case with instructions to enter judgment in accordance with said findings.

Respectfully submitted,

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